TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 260

PANAMA RAIL ROAD COMPANY, PETITIONER,

vs.

AGAPITO VASQUEZ, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF MAXIMILIANO SANCHEZ, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JANUARY 29, 1926

CERTIORARI GRANTED MARCH 8, 1926

(30,837)

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[fol. a] **IN COURT OF APPEALS**

[Caption omitted]

REMITTITUR—December 17, 1924

AGAPITO VASQUEZ, as Admr., &c., Respondent,

against

PANAMA RAILROAD COMPANY, Appellant

Be it remembered that on the 5th day of July, in the year of our Lord one thousand nine hundred and twenty-four, Panama Railroad Company, the appellant in this cause, came here unto the Court of Appeals by Richard Reid Rogers, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Agapito Vasquez as administrator, &c., the respondent in said cause afterwards appeared in said Court of Appeals by Frederick R. Graves, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. b] Whereupon, The said Court of Appeals this cause having been submitted by Counsel for the respective parties, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the Supreme Court before the Justices thereof, etc.

Wm. J. Armstrong, Clerk of the Court of Appeals, State of New York.

Court of Appeals, Clerk's Office

Albany, December 17, 1924

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 1] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels, and Credits which were of Maximiliano Sanchez, Deceased, Plaintiff-Respondent,

against

PANAMA RAIL ROAD COMPANY, Defendant-Appellant

STATEMENT

The above-entitled action was commenced by the service of a summons and complaint on the defendant on the 23rd day of September, 1921.

The answer of the defendant was served on the 24th day of October, 1921.

The plaintiff's attorney is Frederick R. Graves, Esq. The defendant s attorney is Richard Reid Rogers, Esq.

There has been no change of parties or attorneys herein.

The action was tried before Hon. Wm. B. Carswell and a jury, on the 25th and 26th days of April, 1923, and the jury rendered a verdict for the plaintiff in the sum of $9,900, to be awarded to the mother of the plaintiff's intestate.

The defendant thereupon moved to have the verdict set aside and [fol. 2] a new trial granted, but the motion was denied. The Court, however, allowed a reargument of said motion on the 3rd day of May, 1923, and thereupon the motion was granted unless the plaintiff should stipulate for a reduction of the verdict to $7,000, in which event the motion was denied.

The plaintiff thereafter stipulated that the verdict might be reduced to $7,000, and a judgment was entered on the 12th day of May, 1923, in favor of the plaintiff and against the defendant, for the said amount, together with costs as taxed, and including, over the objection of the defendant, interest upon the amount of the verdict from the date of the death of plaintiff's intestate, amounting in all to $7,895.30.

The defendant's notice of appeal to the Appellate Division for the Second Department was served on the 6th day of June, 1923, and filed on the 8th day of June, 1923.

The said appeal was heard in the Appellate Division, and on the 11th day of January, 1924, the Appellate Division rendered its decision and made its order modifying the judgment of the Trial Court, by striking out the item of $717.59, being interest on the verdict, and affirming the said judgment as so modified, without costs. A judgment was entered upon said decision in the office of the Clerk of Kings County on the 12th day of May, 1924.

The defendant's appeal to the Court of Appeals from said judgment entered upon the decision of the Appellate Division was served upon the plaintiff's attorney on the 16th day of May, 1924, and was filed in the office of the Clerk of Kings County on the 17th day of May, 1924.

[fol. 3] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

Please take notice that the Panama Rail Road Company, defendant herein, appeals to the Appellate Division of the Supreme Court for the Second Department, from the judgment of this Court filed and entered herein on the 12th day of May, 1923, ordering and adjuding that the plaintiff recover of the defendant the sum of $7,000.00, with costs in the sum of $177.80, and interest in the further sum of $717.50, amounting in all to the sum of $7,895.30, and from each and every part of said judgment, as well as the whole thereof, and particularly from that part of said judgment allowing interest in the sum of $717.50; from the order of said Court made upon the trial of said action denying the motion of the defendant that the verdict be set aside and a new trial granted, and from each and every part of said order, as well as the whole thereof; and from the further order of this Court made and entered herein on the 3rd day of May, 1923, upon the re-argument of the motion to set [fol. 4] aside the verdict and grant a new trial, in so far as said last-named order denied said motion on condition that the plaintiff stipulate that the verdict be reduced to $7,000.00.

Dated, New York, N. Y., June 6th, 1923.

Richard Reid Rogers, Attorney for Defendant, Panama Rail Road Company.

Office & P. O. Address: No. 63 Wall Street, Borough of Manhattan, New York City.

To: Frederick R. Graves, Esq., Attorney for Plaintiff, 256 Broadway, New York City. Clerk of the Supreme Court, for Kings County, Brooklyn, New York.

[fol. 5] IN SUPREME COURT OF NEW YORK

[Title omitted]

SUMMONS

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Trial desired in the County of Kings.

Dated September 22nd, 1921.

Frederick R. Graves, Plaintiff's Attorney.

Office and Post Office Address: 256-257 Broadway, Borough of Manhattan, City of New York.

[fol. 6] IN SUPREME COURT OF NEW YORK

KINGS COUNTY

[Title omitted]

COMPLAINT

The plaintiff complaining as administrator aforesaid respectfully alleges and shows:

First. Upon information and belief that at all the times hereinafter mentioned, the above named defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, and at all said times was and now is doing business in the said State, with its principal office for the regular transaction of business in the Borough of Manhattan, City, County and State of New York.

Second. Upon information and belief that at all the times hereinafter mentioned the above named defendant owned or leased and operated and controlled a certain steamship known as the "General W. C. Gorgas".

[fol. 7] Third. Upon information and belief that at all the times hereinafter mentioned the decedent, Maximiliano Sanchez was in the employ of the above-named defendant on board the said steamship "General W. C. Gorgas" in the capacity of coalpasser, at the rate of wages of $75.00 per month.

Fourth. Upon information and belief that it was the duty of the defendant to provide plaintiff's intestate with a safe and seaworthy vessel and appliances and to keep the same in a safe condition; to furnish him with reasonably safe and seaworthy tools and appliances and keep the same in a proper state of repair; to furnish plaintiff with a sufficient number of competent co-employees and superior officers; to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn the plaintiff of the dangers arising and to be encountered therein.

Fifth. That by reason of the negligent failure of the defendant, and its servants, to perform the foregoing duties and each of them, on or about the 26th day of August, 1921, while plaintiff's intestate was engaged in his employment on behalf of said defendant on board said Steamship "General W. C. Gorgas" in waters within the State of New York, his person came into contact with a portion of a wire which was heavily charged with electricity, and he thereby sustained severe personal injuries which directly caused his death on the same day, without fault on his part.

Sixth. Upon information and belief that said injuries were directly caused on account of the dangerous, defective and unsea- [fol. 8] worthy condition of said wire and its appurtenances which were part of the equipment and appliances furnished by the de-

fendant for said work, and because the same was dangerous, defective and out of repair, not properly insulated or protected, of improper construction and design and wholly unsuited for the purposes for which it was furnished and used.

Seventh. Upon information and belief that said injuries were further caused by reason of the negligence of the defendant and its servants in furnishing and ordering plaintiff's intestate to work in and about said dangerous appliances, in failing to make proper inspection or to take any proper steps or precautions to discover and remedy said defective condition and in negligently failing to warn plaintiff's istestate of said danger.

Eighth. Upon information and belief that by virtue of Section 20 of the Seamen's Act of June 5th, 1920, whereby all statutes heretofore enacted in favor of railroad employees engaged in foreign or interstate commerce were made applicable to seamen employed upon American vessels, and particularly Sections 8657 and following of the United States Compiled Statutes, plaintiff as the personal representative of the decedent herein is entitled to recover damages for the negligence of the defendant, and of the decedent's co-employees in the defendant's service.

Ninth. Upon information and belief that said injuries and the death of plaintiff's intestate were not caused by any fault or want of care on the part of the plaintiff's intestate, but wholly and solely by [fol. 9] reason of the dangerous, defective and unseaworthy condition of the vessel and her appliances and the negligence of the said defendant.

Tenth. Upon information and belief that at all the times hereinafter mentioned the said Steamship "General W. C. Gorgas" was an American vessel and the plaintiff's intestate signed regular shipping articles and became a member of the crew of said vessel in an American port.

Eleventh. That on or about the 16th day of September, 1921, Letters of Administration limited to the prosecution of this action were duly issued and granted to the plaintiff by the Surrogate of the County of Kings and the plaintiff duly qualified thereunder.

Twelfth. Upon information and belief that said Maximiliano Sanchez, deceased, left him surviving a mother and one of more brothers and sisters, and that prior to the death of said Maximiliano Sanchez he had been in good health and in possession of all of his faculties and was steadily employed at his work as seaman. Upon information and belief that said mother and the aforementioned one or more brothers and sisters were dependent upon said Maximiliano Sanchez for their maintenance and support and that they and the administrator of said estate have been damaged by his death in the sum of Thirty-five Thousand and 00/100 ($35,000.00) Dollars; upon information and belief that said decedent owed various sums of money and further sums were necessarily contracted for his

[fol. 10] funeral expenses, all of which will amount to the sum of Seven Hundred and Fifty and 00/100 ($750.00) Dollars and which will have to be paid by his estate, and that the plaintiff has been thereby further damaged in the sum of Seven Hundred and Fifty and 00/100 ($750.00) Dollars.

Thirteenth. That this action was commenced within two (2) years after the death of the said Maximiliano Sanchez.

Wherefore, plaintiff demands judgment against the defendant for the sum of Thirty-five Thousand Seven Hundred and Fifty and 00/100 ($35,750.00) Dollars as damages, together with the costs and disbursements of this action.

Frederick R. Graves, Plaintiff's Attorney.

O. & P. O. Address: 256-257 Broadway, Borough of Manhattan, City of New York.

[fol. 11] In Supreme Court of New York

[Title omitted]

Answer

The defendant, Panama Rail Road Company, by Richard Reid Rogers, its attorney, answering the complaint herein alleges as follows:

First. Answering paragraph of the complaint designated "Fourth" denies on information and belief that the duty of the defendant was as alleged in said paragraph.

Second. Answering paragraph of the complaint designated "Fifth" denies on information and belief that any injuries sustained by the plaintiff's intestate at the time and place referred to in said paragraph occurred by reason of any negligent failure of the defendant, or of its servants or any of them, to perform the duties referred to, or any of said duties, or by reason of their negligence or the negligence of any of them in any other respect; denies on information and belief that if the person of the plaintiff's intestate came into con-[fol. 12] tact with a portion of a wire the said wire was heavily charged with electricity, or bore any charge heavier than a normal and customary charge; denies having any knowledge or information sufficient to form a belief as to whether by contact with any such wire the said plaintiff's intestate sustained any personal injuries, or whether if he did sustain any such injuries they caused his death; and denies on information and belief that any such contact was without fault on the part of the said intestate.

Third. Denies on information and belief each and every allegation contained in paragraphs of the complaint designated "Sixth," "Seventh," "Eighth" and "Ninth."

Fourth. Answering paragraph of the complaint designated "Tenth" denies on information and belief that at the time referred to in the complaint the plaintiff's intestate was serving under regular shipping articles.

Fifth. Denies, on information and belief, each and every allegation contained in paragraph of the complaint designated "Eleventh."

Sixth. Answering paragraph of the complaint designated "Twelfth" denies having any knowledge or information sufficient to form a belief as to the allegations thereof, except that it denies on information and belief, that the relatives of Sanchez if any, or the administrator of his estate, or both, have been injured in any sum approaching the sum named in said paragraph; denies that any sums of money owed by the decedent, if any, constitute a proper [fol. 13] charge against the sum of money, if any, recoverable in this action; denies that any sums were necessarily contracted for funeral expenses other than such funeral expenses as have been paid by the defendant; and denies, therefore, that the plaintiff has been further damaged by reason of sums of money owed by the decedent or contracted for his funeral expenses in any sum whatsoever.

And for a first affirmative defense defendant alleges on information and belief:

Seventh. That the negligence, if any, which produced the injuries resulting in the death of plaintiff's intestate was either his own negligence or that of his fellow servant, or both, and was not the result of any failure on the part of the defendant to furnish a seaworthy ship and reasonably safe and proper appliances for the conduct of the work in which the said intestate was engaged, and that defendant therefore is not liable for any damages resulting from said injuries or death.

And for a second affirmative defense defendant alleges on information and belief:

Eighth. That even if the negligence of some other person be held to have contributed to the injuries of the intestate, they were nevertheless contributed to by the negligence of the intestate himself, and for that reason any damages recoverable therefor should be either wholly remitted or at least proportionately diminished.

[fol. 14] Wherefore defendant prays that the complaint be dismissed and for its costs and disbursements in this action.

Richard Reid Rogers, Attorney for Defendant, Panama Rail Road Company.

Office & P. O. Address, #63 Wall Street, New York City.

Sworn to by Edward A. Drake. Jurat omitted in printing.

[fol. 15] IN SUPREME COURT OF NEW YORK

[Title omitted]

MINUTE ENTRIES

This cause having been called for trial in its order on the Calendar, and twelve trial Jurors having been duly drawn, empanelled and sworn to try the same April 26, 1923, the Jury come into Court and say that they find a verdict for the plaintiff for $9,900.00.

Defendant's counsel moves to set aside the verdict on all grounds stated in Section 549 of the Civil Practice Act and on the further ground the jury has not determined which beneficiary is to receive [fol. 16] it. The jury are instructed to amend their verdict so as to state the proposition which is to go to the next of kin and naming them.

The jury say they find a verdict for the plaintiff, mother, for $9,900.00.

Defendant's counsel moves to set aside the verdict and for a new trial on the evidence and on all grounds stated in Section 549 of the Civil Practice Act, and on the further ground that the jury had failed to apportion the damages and had no right to amend their verdict having once rendered the same. Motion denied.

30 days stay of execution after service of notice of entry of judgment and 60 days in which to make and serve a case granted.

May 3, 1923, on re-argument, defendant's motion to set aside the verdict and for a new trial is granted unless plaintiff agrees to accept $7,000.00.

A true extract from the minutes.

William E. Kelly, Clerk

[fol. 17] IN SUPREME COURT OF NEW YORK

[Title omitted]

STIPULATION REDUCING VERDICT

An order having been entered herein directing that the verdict rendered in the above stated case in favor of the plaintiff for the sum of Nine Thousand Nine Hundred ($9,900) Dollars, be set aside and a new trial ordered unless the plaintiff shall stipulate that the amount of the verdict be reduced to the sum of Seven Thousand ($7,000) Dollars, the plaintiff hereby stipulates that the amount of the verdict be reduced to the sum of Seven Thousand ($7,000) Dollars.

Agapito Vasquez, as Administrator of the Goods, Chattels and Credits of Maximiliano Sanchez, Deceased.

[fol. 18] STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me Agapito Vasques, in his official capacity as the administrator of the goods, chattels and credits of Maximiliano Sanchez, plaintiff in the above entitled action, to me known and known to me to be the person who executed the foregoing stipulation and acknowledged to me that he executed the same this 3rd day of May, 1923.

Simon N. Gazan.

Received May 9, 1923. Rich'd Reid Rogers.

[fol. 19] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT

The issues in the above entitled action having duly come on to be heard before the Hon. Justice William B. Carswell, and a Jury at a Trial Term, Part II, of the Supreme Court, held in and for the County of Kings, at the Court in said County, on the 26th day of April, 1923, and the plaintiff having appeared by Frederick R. Graves, Esq., his attorney, and the defendant having appeared by Richard Reid Rogers, Esq., his attorney, and the proofs of the plaintiff and of the defendant having been presented to the Jury, and the Jury having rendered a verdict in favor of the plaintiff and against the defendant in the sum of Nine Thousand Nine Hundred ($9,900.00) Dollars, and the defendant having thereupon moved to set aside the verdict and for a new trial and an order having been made on said motion directing that the said motion be granted unless the plaintiff should within ten days thereafter consent and [fol. 20] stipulate that the verdict be reduced to and stand in the sum of Seven Thousand ($7,000.00) Dollars, in which event the motion was to be denied, and the plaintiff having within the time so specified, consented and stipulated, and the costs of the plaintiff having been duly adjusted at the sum of One Hundred Seventy-seven and 50/100 ($177.50) Dollars, it is

Now on motion of Frederick R. Graves, Esq., Attorney for the Plaintiff herein,

Ordered and adjudged, that the plaintiff, Agapito Vasquez, as Administrator of the Goods, Chattels and Credits, which were of Maximiliano Sanchez, Deceased, do recover of the defendant, Panama Railroad Company, the sum of Seven Thousand and no/100 ($7,000.00) Dollars, together with the sum of One Hundred Seventy-seven and 50/100 ($177.50) Dollars, costs as taxed, and the further sum of Seven Hundred Seventeen and 50/100 ($717.50) Dollars, interest from the date of the decedent's death, making in

all the sum of Seven Thousand Eight Hundred Ninety-five and 30/100 ($7,895.30) Dollars, and that the plaintiff have execution therefor.

Dated, Brooklyn, New York, May 12th, 1923.

William E. Kelly, Clerk.

[fol. 21] IN SUPREME COURT OF NEW YORK

[Title omitted]

Case

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Wagner: Defendant moves to dismiss the complaint upon the grounds: first, that the so-called Jones Act under which this case was brought provides that the action must be brought within the district in which the defendant has its principal office. In this instance, it appears that the principal office is in the County of New York; and also on the ground that the State courts have no jurisdiction.

[fol. 22] The Court: Denied.

Mr. Wagner: Exception. Also on the second ground, that the so-called Jones Act under which this action is brought is itself unconstitutional in that it attempts to take away the property of the defendant without due process of law, and therefore violates the Fourteenth Amendment to the United States Constitution.

The Court: Denied, with exception.

Mr. Wagner: On the further ground, that the Surrogates' Court, issuing letters of administration in this action had not jurisdiction, in that the deceased was not a resident of the County of Kings, that the accident did not happen here, and defendant had no assets in this County.

The Court: Well, that is a question of proof. Motion denied.

Mr. Wagner: Exception. On the further ground that this accident, having happened in a dry dock while the ship was in dry dock and in the State of New York, this deceased and his legal representatives are relegated to the Workmen's Compensation Law of the State of New York, and have no right of action under the so-called Jones Act.

The Court: Denied.

Mr. Wagner: Exception.

Mr. Graves: This suit is brought under both the Jones Act and the general law. I don't care by my silence to have it claimed later that I based my cause of action on one only.

Mr. Wagner: Then my motion is to cover both acts under which this plaintiff claims, that this court has not jurisdiction.

The Court: What is your other point?

Mr. Graves: The ordinary cause of action at common law. We [fol. 23] don't have to elect at the end of the case.

The Court: Motion denied on that.
Mr. Wagner: Shall I open now or wait until the end of plaintiff's case?
The Court: You may either open now or waive.

A jury was duly empaneled and sworn.
Mr. Graves opened the case for the Plaintiff.
Mr. Wagner opened the case for the Defendant.

GEORGE MORD, 1026 Bay Street, Staten Island, New York, a witness called on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Graves:

Q. You are a licensed physician and surgeon?
A. I am.
Q. Do you hold any public office?
A. I do; I am the assistant medical examiner of the City of New York in charge of the Borough of Richmond.
Q. Did you hold that position in August, 1921?
A. I did.
Q. Do you remember in the course of your official duties examining the body of one Maximiliano Sanchez?
A. I do.
Q. Do you remember the date?
A. By looking at my letters I find that it was August 26th, 1921.
Q. Will you tell the jury just what you did and what examination you made?
[fol. 24] A. I viewed the body at the Shipyards at Mariner's Harbor, and I found the body in the boiler room, and I had the body removed from there to the Morgue in Richmond, where I made a subsequent examination. I found he had a burning of the right thumb, of the inner surface of the terminal and first phalanx, burning on the index finger, on the first and third phalanges, on the inner surface.
Q. Which hand, doctor?
A. Right.
Q. Now what sort of burnings were these?
A. Caused by—those were electrical burnings.
Q. Did you examine the body to see whether the man was dead or not?
A. He was dead.
Q. What, in your opinion, was the cause of death?
A. Cardiac paralysis, due to electric shock caused by coming in contact with a live electric wire.
Q. Doctor, was not a certain electrical wire turned over to you at the time?
A. It was.

Q. Is that in your possession?
A. It is.
Q. Has either side asked you to bring it to court?
A. I was subpenaed by the defendant to bring it to court.
Q. Have you that wire here in court?
A. I have.

Cross-examination by Mr. Wagner:

Q. Doctor, you came upon this boat immediately after the accident?
A. The case was reported to me immediately after the man was pronounced dead.
Q. And you went right aboard the boat?
A. I did.
Q. Who did you see there—do you recall a man named Lombardo being there?
A. Yes.
[fol. 25] Q. Do you recollect a Mr. Montgomery being there?
A. I do.
Q. Is this the Mr. Montgomery that you saw there?
A. Yes.
Q. Who was it handed you that wire?
A. Mr. Montgomery.
Q. And may I ask is this the parcel, is this the wire?
A. Yes.
Q. Where has this wire been since it was handed to you?
A. In the Medical Examiner's office.
Q. Has anyone else besides you had access to it?
A. The clerk.
Q. Has there been any change in this wire since it was handed over to you?
A. There has not.
Q. In other words, this wire is in the same condition it was in at the time it was handed to you?
A. It is the same wire that was given me on the steamship and was taken to my office.

Mr. Wagner: I offer this wire in evidence.
Mr. Graves: I object to it; there is no proof yet.
The Court: There has been no identification.
Mr. Wagner: Then I ask leave to suspend until I can get it.
The Court: As a matter of fact, it is not cross examination at all.
Mr. Wagner: I ask to have the wire marked for identification.

(The article was marked Defendant's Exhibit A for identification.)

[fol. 26] William Green, residing at Susquehanna, Pennsylvania, a witness called on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Graves:

Q. Mr. Green, how old a man are you?
A. 51, sir.
Q. What has been your business chiefly?
A. I have been chief plumber on board ship at the time.
Q. Have you ever served as deck engineer on board vessels?
A. Yes, sir.
Q. How many years have you been going to sea, just roughly?
A. Probably ten or twelve years.
Q. Are you familiar with vessels sailing in and out of this harbor?
A. Some out of this harbor.
Q. What boats have you been on?
A. I have been on the Invincible.
Q. A Shipping Board boat?
A. Shipping Board boat.
Q. All right, go ahead?
A. I have been on the Hayden, a Shipping Board ship. The last ship I shipped out of Boston was—out of this Port, U. S. Ship "Pocahontas."
Q. Shipping Board?
A. Shipping Board.
Q. What other boats?
A. I can't think of any other by name just now.
Q. At any rate you have been going to sea off and on ten or twelve years?
A. Off and on.
Q. Does the deck engineer have anything to do with portable lights?
A. Yes.
Q. Occasionally.
A. Sometimes we have to use them.
Q. Are you familiar with the kind of portable lights that were used on board ship?
A. Yes, sir.
[fol. 27] Q. Will you describe to the jury in your own words what is the usual and customary class of portable lights used on board American vessels sailing out of this Port that you have been on?
A. The usual light is a cord as a rule, with the two wires, what we call a cable, with two wires inside insulated both ways. Inside of this insulation, these two wires are insulated also.
Q. What do they usually have at the end of the wire.
A. At the end that you handle with your hand is usually a cage, we call it a cage.
Q. Is that the customary appliance that is used?
A. That is on the idea of the kind that you should have.

The Court: Strike out the kind that you should have.

Q. Is that what they usually have, the kind that is customarily used?
A. It is the customary light.

Mr. Graves: I ask to have it marked for identification.
(The article was marked Plaintiff's Exhibit 1 for identification.)

Q. Are appliances such as this Plaintiff's Exhibit 1 for identification for sale in ship supply stores?
A. Yes, sir.
Q. In all ports?
A. In all ports in the United States.
Q. And that is customarily what is used, is it?
A. Yes, sir.
Q. Will you explain to the jury the workings of this handle?
A. (Illustrating) Now, the idea, this here cord goes through here, and then is connected to the socket and then this here, this is [fol. 28] insulated rubber here, it prevents any current getting into the handle, and therefore it is insulated up here; there is no chance of current getting to the person using this cage.
Q. On account of moisture, or if this here was defective, so that the wire would make a connection here, then the electrician should know of that and ought to fix it.

Mr. Wagner: I move to strike that out.
The Court: Strike out he ought to know.

Q. Well, is the purpose of that appliance first to keep moisture from going into the uninsulated portion of the wire?
A. Yes, sir.
Q. And consequently to prevent the hand from coming in contact with the wire at all?
A. Yes, sir.

Cross-examination by Mr. Wagner:

Q. Mr. Green, were you ever employed as fireman on board ships?
A. I never sailed as a fireman or coal passer.
Q. You were a coal passer?
A. I never was.
Q. Never employed as a fireman or coal passer, is that right?
A. That is right.
Q. Did you ever have charge of the fire room or of the firemen or coal passers?
A. No, sir.
Q. Isn't it a fact that this light that is introduced here is used in and about the decks instead of in the engine room?
A. It is used all over the ship.

Mr. Wagner: I move to strike out the answer "used all over the ship"; he said that he never was inside.
The Court: Motion denied.
[fol. 29] Mr. Wagner: Exception.
The Court: You don't need to be in charge of a ship to see what is on it.

Q. Isn't it a fact that a wire and light such as this Defendant's Exhibit A for identification is the one that is used in engine rooms?
A. I never saw one used to my knowledge on board a ship.
Q. Never saw that kind of a light aboard a ship?
A. Never saw one used.
Q. Never saw one used?
A. Never saw one on board ship to my knowledge that way?
Q. Is that the kind of wire they use aboard ship?
A. The main cable is.

Mr. Graves: The main cable itself?
The Witness: Yes, sir.

Q. You never saw any of those in an engine room?
A. No, sir.
Q. Never saw one in a ship's storeroom?
A. Not like that.
Q. Did you have charge of a ship storeroom at any time?
A. No, sir.

Mr. Wagner: I move to strike out his answer that he didn't see it, that he never saw one aboard a ship.
The Court: Motion denied; that goes to the weight of his testimony.
Mr. Wagner: Exception.
Mr. Graves: I now offer that in evidence.
Mr. Wagner: I object to it as incompetent; this witness has not shown himself to be competent to testify as to how it is used.
The Court: Overruled.

(The article was marked Plaintiff's Exhibit 1.)

[fol. 30] Mr. Graves: I offer in evidence the deposition of Louis Gonzales, taken on September 27, 1921, before a notary public.
The deposition of Louis Gonzales was read by Mr. Graves as follows:

"Louis Gonzales, being first duly sworn deposes and says through an interpreter:

Direct examination by Mr. Walzer:

"Q. What is your full name?
"A. Louis Gonzales.
"Q. What is your business?
"A. I am a seaman.
"Q. How long have you been a seaman?
"A. Ten years.
"Q. Were you a member of the crew of the S. S. "General W. C. Gorgas"?
"A. I was one of the first four that went and signed by the shipping master.
"Q. When did you join that vessel?
"A. Last month, I do not remember it was the 27th or 23rd.

"Q. That is, of August?
"A. No, last month.
"Q. Last month was August?
"A .Yes, sir.
"Q. This is September?
"A. Yes.
"Q. What was your job on the ship?
"A. Coal passer.
"Q. Do you know the names of the other three men who were sent with you to the vessel?
"A. One, the dead one only.
"Q. What was his name?
"A. The others told me his name was Maximiliano Sanchez."

Mr. Wagner: I move to strike out the answer as to what was stated to him?
[fol. 31] The Court: Yes, stricken out and the jury will disregard it.

"Q Where was the vessel at the time you joined her?
"A. Mariners' Harbor, Staten Island, shipping yard.
"Q. Was that a dry dock?
"A. No, after I was on board two days the boat went to the dry dock.
"Q. What dry dock?
"A. I do not know, a small dry dock, I do not know.
"Q. Was that also in Staten Island?
"A. Yes, sir. It is a floating dock.
"Q. Was Sanchez, the dead man, on board at the same time you were?
"A. Yes, because the four of us, we were together."

Mr. Wagner: I move to strike out that answer as stated above; he didn't know himself except as some one told him.
The Court: Stricken out and the jury will disregard it.

"Q. What was his job on the ship?
"A. The four were coalpassers.
"Q. Do you know the names of the other two coalpassers?
"A. No, I do not know.
"Q Do you know what day Sanchez got killed?
"A. On the third we were on board working."

Mr. Wagner: I move to strike out, because he didn't know Sanchez except on hearsay.
The Court: Stricken out.

"Q. This is three days after you joined the ship?
"A. Yes.
[fol. 32] "Q. Do you know the day that you joined the ship?
"A. No, I do not remember, no, sir.
"Q. Who else was on the vessel at the time you four men were there, besides the four coalpassers?
"A. The Chief Engineer, first assistant and,—the second and first assistants, watertenders, and oilers.

"Q. Do you know the name of the watertender?
"A. I do not remember at all.
"Q. Do you know the names of any of the officers?
"A. No, I do not know them either.
"Q. Were all four coalpassers engaged in doing the same kind of work during the first three or four days?
"A. Yes, sir.
"Q. What work did you first engage in doing on board this vessel?
"A. The two first days we change coal from one bunker to another.
"Q. And were all four men engaged in transferring coal from one bunker to another?
"A. Yes, sir, the four.
"Q. Finished that in two days?
"A. Yes, sir.
"Q. What did you do on the third day?
"A. We brought from the deck, cement and bricks to build the bridge in the fireroom the third day, then Sanchez went down into the boiler."

Mr. Wagner: I move to strike out the last part of the answer "then Sanchez went down into the boiler."
The Court: Strike out "then Sanchez went down into the boiler."

"Q. Who gave you orders to do the work on the third day?
"A. I believe it came from the engineer to the watertender and he gave it to us.
"Q. The orders were received by you through the watertender, is that right?
"A. Yes, sir.
[fol. 33] "Q. What did he tell you to do?
"A. To make new bridges on the boilers.
"Q. What do you mean by that, new bridges in the fire boxes?
"A. Inside in the firebox.
"Q. How many boilers were there on the ship?
"A. Two for navigation and one for port—a donkey boiler.
"Q. So that there were two large boilers and one small donkey boiler, is that right?
"A. Yes, sir, one small.
"Q. And were these single or double boilers?
"A. Two double boilers.
"Q. Two large double boilers, is that right?
"A. Yes.
"Q. And how many fireboxes were there in each boiler?
"A. Two double ones, or else four fires in each boiler.
"Q. Do you mean four fires in each boiler or four fires all together?
"A. There is two big fires in each boiler with four doors.
"Q. Four doors in each boiler?
"A. Yes, sir.
"Q. So that in the two boilers there were eight firebox doors?

"A. Yes, sir.

"Q. And what was there between the two fires in each boiler?

"A. Between those fires there comes the bridges. There is a wall that they call the back connection, but you can see from one fire to another.

"Q. How far above the bottom of the firebox do these bridges extend?

"A. All that can be had inside, as much as you can.

"Q. How high above the bottom of the fire box do the bridges extend up, how high were they built, in other words?

"A. Four layers of bricks.

"Q. And are these bridges you were engaged in building on the third day?

"A. Yes, sir.

[fol. 34] "Q. What boiler did you first start with, the port or starboard boiler?

"A. I am trying to think, where the bow was,—we had the bow toward the shore and the stern toward the sea, (trying to locate it by thinking of the bow and the stern), on the left side.

"Q. How many men were engaged in building bridges in that one boiler?

"A. One in each fire, or there is two in the big fires.

"Q. That is, there was one man in each firebox at the time of the building of the bridges; is that right?

"A. In each fire.

"Q. In each firebox you mean?

"A. In each firebox.

"Q. And what were the other two men doing?

"A. I was outside of the boiler to bring water and cement, and the other man did the same to the other man that was inside.

"Q. In other words, one man in each firebox and another man outside of each firebox to bring material to the man stationed inside?

"A. Yes, sir.

"Q. Which were the two men that were stationed inside the firebox?

"A. One was Maxmiliano Sanchez, and the other was the boy that is outside. The boy outside is also a witness, Daniel Baca."

Mr. Wagner: I move to strike that out.

The Court: There has been no question asked, so there is no objection.

"Q. And who were you bringing material to, Sanchez or to Baca?

"A. To Sanchez."

Mr. Wagner: I object to the question itself. The man stated that he did not know Sanchez, and I move to strike out the answer.

[fol. 35] The Court: What was the answer?

Mr. Wagner: The answer was Sanchez.

The Court: The answer is stricken out.

"Q. What time of the day on the third day did you start doing this work?

"A. In the morning about ten minutes after eight.

"Q. Were there any lights in the foreroom?
"A. No, there was none aboard.
"Q. How could you get lights?
"A. From the dynamo ashore they connected the wire to bring the light aboard.
"Q. Did you see that work done?
"A. No, I did not."

Mr. Wagner: On that answer, I move to strike out the previous answer.

The Court: What is the previous answer?

Mr. Wagner: How could you get light from the dynamo, did you see that work done, and he says, "No, I did not." I move to strike it out on the ground the witness didn't know.

The Court: Motion denied: he could see the result without seeing it done.

Mr. Wagner: Exception.

"Q. Do you know that there was a wire stretched from the shore to the vessel for the purpose of lighting the vessel at that time?
"A. Yes, sir.
"Q. From this line that was extended from the shore, was there an outlet in the fireroom where you were working?
"A. It came and was connected to the wires that were on board, and then we had a large bulb in each fireroom.
[fo]. 36] "Q. How many outlets were there in the fireroom?
"A. There was one that had a double outlet, one had a bulb, and the other had a connection to bring the light to the fireroom—then here was the free outlet, then the watertender came and connected it into that socket and gave it to Sanchez on a long wire."

Mr. Wagner: I move to strike out "gave it to Sanchez on a long wire."

The Court: Strike it out, and the jury will disregard anything that is stricken out.

"Q. You say that in this fireroom there was an outlet with double socket, is that right?
"A. Yes, sir.
"Q. And that there was a bulb in one of the sockets to light the fireroom?
"A. Yes, sir. That was the one that gave the light in the fireroom.
"Q. Now, you spoke about the wire that the watertender brought—who asked the watertender to bring the light, or wire?
"A. Had to bring a light by all means, because there was no means of seeing in the firebox.
"Q. That is, the firebox was absolutely dark?
"A. Yes, sir.
"Q. And you had to have an extension light put into the firebox to see how to build the bridges, is that right?
"A. Yes, sir. Inside was too dark, could not see.
"Q. So that the watertender brought you a wire connection; is that right?

"A. Yes, he did bring the light.
"Q. The watertender brought a connection that was to be used in the firebox where Sanchez was working; is that right?
"A. Yes."

Mr. Wagner: I object on the ground that the witness did not know Sanchez.
The Court: Objection sustained.

[fol. 37] "Q. Did you see where he got this wire connection from?
"A. I did not see him take the wire, but he told us he got it from the storeroom."

Mr. Wagner: I move to strike out what he told him.
The Court: Strike out what he told him.

"Q. Who connected this wire up?
"—. The watertender himself.
"Q. Did you see him connect the wire up?
"A. Yes, sir.
"Q. Tell us what he did?
"A. As he connected the wire, I was outside stirring up the cement and water. Then he gave the wire to Sanchez inside the firebox."

Mr. Wagner: I move to strike it out.
The Court: Strike out "he gave the wire to Sanchez inside the firebox."

"Q. Were you present?
"A. Yes, he was inside in the firebox."

Mr. Wagner: I move to strike out the latter part of that.
The Court: Strike out he was present in the firebox.

"Q. One end of this wire was connected to the socket in the fireroom, is that right?
"A. Yes, sir.
"Q. And the other end contained a socket and bulb, is that right?
"A. Yes, sir, that was what give the light.
"Q. That was the light that was put into the firebox where Sanchez was stationed; is that right?
"A. Yes, sir."

[fol. 38] Mr. Wagner: I object and move to strike out the answer.
The Court: Objection sustained and answer is stricken out.

"Q. Can you tell how long this wire was that extended from the socket in the fireroom to Sanchez in the firebox?"

Mr. Wagner: I object to that, on the ground that the witness is not competent to testify; he didn't know Sanchez.
The Court: Objection sustained.

"Q. Do you know how many feet it was?
"A. I do not know how many feet, about that long (indicating 12 to 15 feet). It was long and thick.

"Q. What was the color of wire, do you know?
"A. Black.
"Q. Did you personally hand the wire to Sanchez, or place the wire in the firebox, or did the watertender do that?"

Mr. Wagner: I object to that on the same ground.
The Court: Objection sustained.

"Q. Did you see this wire or bulb prior to the time it was being handed to Sanchez in the firebox?"

Mr. Wagner: I object to that on the same ground.
The Court: Objection sustained.

"Q. You did not examine the wire at that time?
"A. No, sir, I did not.
"Q. How long did Sanchez work in there?"

Mr. Wagner: I object to that on the same ground.
The Court: Objection sustained.

[fol. 39] "Q. Then what happened?
"A. He was working very happy and whistling inside, fixing. A moment before he told me to put a little more water in the cement, it was too thick, then, of course I took the bucket and went out to get the water, and put it in the cement, and I was stirring it up. Then I heard someone shout about three times, very short shout."

Mr. Wagner: Now, I move to strike out all of that answer that refers to the deceased Sanchez on the ground that he did not know Sanchez.

The Court: Motion denied. He refers to a man "he," that is all I get so far as some man was in that place, the identity will have to be established in some other way. Motion denied.

Mr. Graves: Later in the testimony he was identified, not by name, but identified the body in there and all that, so this entire testimony will be relevant and I shall then ask to have it all reinstated.

The Court: We will when we get to that point.

"Q. Was it Sanchez?
"A. Yes, sir, Sanchez. Then I raise up, I did not think it was Sanchez, I thought it was someone else aboard, who was working there. Then I got up and went to see Sanchez inside and it was no light. Then I asked what was the matter,—'What is the matter,' and Sanchez did not say anything. Then the other boy that *that* is outside told me to pull the wire,—then I took the wire and give it a jerk, then the wire fell on the floor, then it sparked. Then I [fol. 40] took up the wire very carefully,—I did not think the man was dead then, I commenced to run my fingers through the wire and as I was getting near the socket a little bit then it gave me a little shock, then I threw it down. Then I went out to call the watertender. The watertender was coming out from the engine room to the fireroom, and I told the watertender, and asked did he have

another globe. He said, "What is the matter, did you break it already?" Then I said, "No, I did not break it." He went out and got a globe, then the watertender had some difficulty in getting one on, the pieces of glass were stuck in the socket,—the last part of the bulb, the screw of the bulb. Then he went up and disconnected it and then he took it out. After that he went and connected it again and put the globe on. Then he also felt the wire and I believe that he also got a shock. Then he put his hand in his pocket and pulled out a roll of tape and then he commenced to wind it round and round it up to the socket.

"Q You say he wound the tape around what?

"A. He put about an inch on the wire and then over the entire socket.

"Q. You mean the wire right next to the socket is that where he wound the tape?

"A. Yes. I saw it around the socket and it was uncovered.

"Q Did you see him put the tape around the wire and socket?

"A. Yes, saw him.

"Q. Then what happened?

"A Then as he was putting all the tape around the wire, and he was speaking to the man inside, thinking all the time that he was alive, 'better be careful, do not put any water near this because you will get a shock' he was saying. He did not know the man was dead. Then he pulled out the wire and put the light inside, then he saw the man all cramped up in the very corner of the firebox.

[fol. 41] "Q. Who was cramped up?

"A. Sanchez."

Mr. Wagner: I move to strike that out on the ground he didn't know Sanchez.

The Court: Yes, stricken out.

"Q. Was all cramped up in the firebox?

"A. Yes, sir. Then the watertender got frightened, and then he went inside and grabbed him to bring him out,—and we laid him on the floor and commenced to rub him, massage him,—it was impossible he was dead. The second engineer came over and did the same thing. Then the second engineer said, 'go and call the first assistant or chief.' I found the first assistant, then the first assistant also came down and tried the same operation. Then the first assistant went up and got the chief,—the chief came down, then he said, 'Bring the doctor, but the Doctor never came.' Two gentlemen came from ashore, and a policeman. He asked who was working with Sanchez and I said I, myself."

Mr. Wagner: I move to strike out the last part.

"Q. Who asked you that?

"A. One of those two gentlemen and the policeman, and they got my name."

Mr. Wagner: I move to strike that out.

The Court: Stricken out.

"Q. Then Sanchez was taken out of there?
"A. About an hour after the Doctor came."
"Q. What did he do?
"A. Then the Doctor found he had all his fingers cramped up and he opened them up and see he is burned. He put his ear over his [fol. 42] heart, the Doctor then said he was dead."

Mr. Wagner: I move to strike out what the Doctor said and what this man said the Doctor found.
The Court: Yes, stricken out.

"Q. Did you see Sanchez's hands when the Doctor opened up his fingers?"

Mr. Wagner: I object to the question.
The Court: Objection sustained.
Mr. Graves: Don't you think that the Doctor has connected up the identity of the man that he examined as being the same one?
The Court: We don't know from that deposition who he is talking about.

"Q What did you notice about the palms of his hands?
"A. All inside between the fingers were white, white and purple, around here (indicating the palm and between the fingers).
"Q Both hands or one hand?
"A. Both hands. Yes, the Doctor said both hands."

Mr. Wagner: I move to strike that out.
The Court: Strike out "the doctor said both hands."

"Q Did you see it that way on both hands?
"A. Yes, sir, everybody else saw it. We all saw it."

Mr. Wagner: I move to strike it out.
The Court: "Strike out everybody else saw it.'

[fol. 43] "Q. Let us go back to the time when you heard the cries, you say that you ran to the firebox door and looked in and found it was dark, is that right?
"A. Yes, when I ran it was as far as from here to there (indicating about six feet). Then I saw,—I stuck my head into it and nobody answered. Sanchez never said anything."

Mr. Wagner: I move to strike out "Sanchez never said anything.
The Court: Strike it out.

"Q. This other boy you speak of, was that Baca who is outside now?
"A. Yes, Baca.
"Q. Was he in the same boiler on the opposite side of the bridge?
"A. Yes, in the same boiler, but as there are two fires, Sanchez was here and Baca here (indicating)."

Mr. Wagner: I move to strike it out.
The Court: Strike out Sanchez was here.

"Q. That is, the bridge was between the two of them, is that right?
"A. Yes, sir, the bridge, but you could see from one place to the other.
"Q. That is, from the place where Baca was standing you could see into the firebox where Sanchez was standing, is that right?
"A. Yes, sir."

Mr. Wagner: I object to that on the same ground.
The Court: Objection sustained.
Mr. Graves: And I can have all this reinstated if I connect it up?
The Court: Yes.

"Q. And Baca said something to you, is that right?
"A. He told me to pull out the wire."

Mr. Graves: I object to that.
[fol. 44] The Court: Objection sustained and answer stricken out.

"Q. And did you pull out the wire?
"A. Yes, sir, I pulled with all my strength.
"Q. And as you pulled out what happe-d to the wire?
"A. Then the socket fell on the floor and began to spark.
"Q. What is the floor made of there?
"A. Sheets of iron.
"Q. And you saw sparks between the socket and iron floor, is that right?
"A. Yes, sir."
"Q. And then you picked up the wire?
"A. Then with fear I picked it up carefully. Then I ran my finger through it, and when it was quite a little distance from the socket then I felt the shock."

Mr. Wagner: I move to strike that out.
The Court: Strike it out.

Mr. Rogers:

"Q. How far was your hand from the socket when you felt the shock?
"A. Something about a half inch. As I was coming down then I dropped it.
"Q. What did you notice about the wire at the place where you felt the shock?
"A. Either the wires that were connected were too long, or the wire was uncovered.
"Q. Did you see the wire was uncovered?
"A. I did not see it with my eyes."

Mr. Wagner: With that answer in, I move to strike out the preceding answer, either the wires were connected or were too long.
The Court: Motion denied.
Mr. Wagner: Exception.

[fol. 45] "Q. Well, while you were running your finger along the wire, did you look at the wire?

"A. Yes, I was running my finger and I was looking at it.

"Q. Now, this wire had a cloth covering on it all the way along, did it not?

"A. It was all covered but on the end. I do not believe it was because it was all dirty."

Mr. Wagner: I move to strike out it was all dirty.

The Court: Strike it out, that he did not believe it was because it was all dirty.

Mr. Rogers: I move to strike that out.

"Q. Could you or could you not see the copper wire at or near where the wire was connected to the socket?

"A. A little bit, near the socket a little bit.

"Q. How much would you say,—indicate on that ruler, how much copper wire would you say was uncovered near the socket?

"A. (Witness indicates about a quarter of an inch.)

"Q. Was that right near the socket?

"A. Yes, sir, near the socket. When I felt the shock I dropped it, and then the watertender also passed his finger over and got also a shock, then he took out of his pocket a roll of tape and rolled it all around."

Mr. Wagner: I move to strike out all the answer as not responsive, except "Yes, sir, near the socket"; all the rest I move to strike out.

The Court: The latter part of the answer is all right. Strike out "then the watertender also passed his finger over and got also a shock."

[fol. 46] "Q. How much of the wire did the watertender cover with that tape, how much, indicate on the ruler if you can recall at all?

"A. Two inches or something like that,—it was also on the socket.

"Q. That is, he covered the socket with tape as well?

"A. Yes, sir.

"Q. And then he procured another bulb and put it in and it lit alright?

"A. Yes, sir."

Mr. Wagner read the cross-examination as follows:

"Q. What was the watertender's name?

"A. They called him, the chief calls him, but I do not remember his name.

"Q. How do you identify him?

"A. The man is on board.

"Q. Well, was he working there in the fireroom at the same time you were?

"A. You see, the watertender got so many duties some times he is up, sometimes he is down, he used to come from the engine room.

"Q. Is he the same man who went down to the stock room and got the wire?

"A. Yes, sir, the same man.
"Q. The same man?
"A. Yes.
"Q. You say that when he picked up the wire to fix a new globe on he pulled some tape out of his pocket and wrapped the wire?
"A. Yes, sir.
"Q. How much tape did he have in his pocket?
"A. A roll about that size (indicating about two inches in diameter),—and put half on it.
"Q. About two inches in diameter?
"A. Yes, sir. He used about half of it.
"Q. A roll about two inches in diameter?

Mr. Walzer:

"Q. Indicate with your hands how wide?
"A. (Indicates about four inches) He used half of it.
[fol. 47] "Q. About four inches in diameter,—how wide was this roll?
"A. About half an inch.
"Q. How many feet of tape did he put on the wire?
"A. He turned it around and turned it around,—I cannot say how much, he started on the wire and then went right up. He used about half the roll of tape.
"Q. Do you know how much tape in a roll the size he had?
"A. No, no, I do not know.
"Q. How long was it from the time that this wire and lamp was pulled out of the furnace until it was put back in the furnace with a light reattached by the watertender?
"A. Five or six minutes.
"Q. How long did it take the watertender to wind the wire around the tape?
"A. About half a minute or so, he was going slow.
"Q. Now, did he have this tape in his pocket at the time he picked up the wire?
"A. Yes, sir.
"Q. He did not go off somewhere and get a piece of tape?
"A. No, sir, had it in his pocket.
"Q. Do watertenders always carry tape in their pockets?
"A. Some do, others don't.
"Q. Do you do it?
"A. When I see that the wires are doubtful I carry it in my pocket.
"Q. Didn't you have any then?
"A. I was only a coalpasser and could not attend to those things.
"Q. Wasn't that other man that you refer to as watertender a coalpasser too?
"A. No, he is watertender.
"Q. What nationality is he?
"A. He is Central American, I do not know where he comes from.
"Q. Nicaragua?

"A. I do not know.

"Q. He was not a coalpasser you are sure he was not a coalpasser?

"A. No, he was watertender.

[fol. 48] "Q. How far along the wire did you run your hand when you picked it up?

"A. About a long this size (indicating about three or four feet) and then I run my finger through.

"Q. Where did you start,—with the bulb or away from the bulb?

"A. Not very high up.

"Q. What was the first part of the wire you grabbed, did you pick up the bulb first or the wire part first?

"A. The wire. I was afraid, I went very carefully and put my fingers through it moving down toward the bulb."

Mr. Wagner: I move to strike out the latter part of that answer.

The Court: Stricken out, "I was afraid", and so on.

"Q. You say you felt a slight shock?

"A. Yes, sir, I felt it.

"Q. How close was your hand to the bulb when you felt this shock?

"A. About a half inch.

"Q. After you felt this did you take your hand off or did you continue on up to the socket?

"A. No. I dropped it immediately.

"Q. Never touched it any more?

"A. Then I went and got the watertender.

"Q. Did it burn your hand?

"A. The watertender?

"Q. No, did it burn your hand?

"A. Not much, but a little, as soon as I felt the shock I dropped it."

Mr. Wagner: I move to strike out the latter part of the answer.

The Court: Yes, strike out the latter part.

[fol. 49] "Q. You did not pick the wire and examine it with your eye close, did you?

"A. Only at the time when I say I got my finger through it.

"Q. Well, the wire was covered with cloth, wasn't it, at that place?

"A. Not near the socket.

"Q. How much of the wire was uncovered, naked in other words?

"A. Something about a half inch or so.

"Q. Well, was it uncovered all around the wire?

"A. I do not know whether all of it, or the part where I could see with my eyes only.

"Q. The parts that you could see were uncovered?

"A. Yes, sir.

"Q. All the way around?

"A. Where I put my fingers, no, it was near the socket.

"Q. I understand, but you said you saw the wire, I am trying to find out whether the wire was uncovered all the way around the wire, or whether the wire was uncovered on one side, if you know?

"A. A piece uncovered near the end, you could see the wire. After I threw it, I did not take it again.

"Q. You could see the wire on one side, couldn't you?

"A. Yes, sir.

"Q. Could the wire be seen on the opposite side too?

"A. On the other side, I do not know.

"Q. You do not know whether half was uncovered or whether it was uncovered all around, do you?

"A. You mean the half up above.

"Q. That is the half of the diameter of the wire you could see?

"A. Yes, sir.

"Q. The half of the diameter of wire which you saw was uncovered, as to the other side of the wire you do not know, is that it?

"A. That is right.

[fol. 50] "Q. Now, did this uncovered space run right square up to the socket?

"A. Yes, sir, right to the socket.

"Q. Was there any covered space between the end of the uncovered space and the socket?

"A. No, from the time it was uncovered to the socket it was uncovered.

"Q. That was about half an inch, you think?

"A. Yes, from thereabouts. When I felt the shock and dropped it I did not look at it again."

Mr. Wagner: I move to strike out the latter part of that answer as not responsive.

The Court: Yes, stricken out.

"Q. That wire was in that condition, was it, when Sanchez took it into the boilers?

"A. Yes, sir.

"Q. Did you see it?

"A. No, because the watertender gave it to Sanchez inside."

Mr. Wagner: I move to strike out the later part of that answer as unresponsive.

The Court: Stricken out.

"Q. How did the watertender hold the bulb when he handed it to Sanchez?

"A. He held it on the covered part of the wire.

"Q. In other words, when catching hold of this light how did he grab it by the wire or around the socket with his hand?

"A. He held it on the part of the socket where the wire was uncovered.

"Q. You mean the watertender held it that way when he handed it to Sanchez?

"A. I believe he gave it to him that way.

"Q. You did not see Sanchez take the wire, did you?

"A. No, sir.

[fol. 51] "Q. You never saw it in his hand or saw him handle it at any time?

"A. No.

"Q. All you know is that from the time he handed it to him until the time that he was hurt was about two hours and a little over?

"A. Two hours and a little more.

"Q. He had to crawl into the furnace and drag the cable and lamp along with him, didn't he?

"A. Yes, sir.

"Q. That is about six or seven feet from the opening of the fire box to the bridge?

"A. Yes, sir.

"Q. Do you or do you not know whether he moved the lamp around from time to time when working in the boiler?

"A. It is not necessary. The lamp can be laid on the bricks and then you left it there while working.

"Q. He was building up the bricks; would he have to move it from time to time?

"A. You hang it on this side and then, of course, you can work on the front. That is the way I did any time I built any bridges.

"—. What became of the lamp and cable, do you know?

"A. No, I do not know any more. I only remember hearing shouting; that is all.

"Mr. Walzer: He does not understand the question.

"Mr. Rogers: Repeat the question.

"Q. What became of the lamp and cable, do you know?

"A. The policeman took the whole thing ashore."

[fol. 52] The deposition of DANIEL BACA was read by Mr. Graves as follows:

Direct examination by Mr. Walzer:

"Q. What is your business?

"A. Fireman.

"Q. Were you a member of the crew of the Steamship "General W. C. Gorgas," August, 1921?

"A. Yes, sir.

"Q. What was your job on that ship?

"A. Coalpasser.

"Q. Did you know Maximiliano Sanchez?

"A. Yes, sir.

"Q. Was he also a coalpasser on that ship?

"A. Yes, sir.

"Q. Do you recall when Maximiliano Sanchez died or was killed?

"A. Yes, sir.

"Q. Tell us in your own words, what you know about the death of Maximiliano Sanchez, to this man, slowly?

"A. What do you want me to tell.

"Q. Tell what you were doing, what Sanchez was doing, and how it all happened?

"A. The watertender told us we had to build some bridges. He sent Sanchez to one firebox and he sent me to the other one.

"Q. Were you and Sanchez in the fireboxes of the same boiler?

"A. Yes, sir.

"Q. And what was between you and Sanchez at the time you were working?

"A. A small wall of bricks.

"Q. You say Sanchez worked on the other side?

"A. Yes, sir.

"Q. Go ahead, tell what happened.

"A. I was inside, waiting for bricks and cement to start my work, in the mantime I was talking to Sanchez, about ten minutes after I was working with him and we had made about half the bridge, he [fol. 53] was going to begin the other half when he went to remove the light to see where he was going to put the other bricks, I heard he gave a shout and then I saw him all crouched up, when I saw him in that condition I went towards him. At that moment the other coalpasser Louis Gonzales,——

"Q. When you saw him all crouched up what was he doing, or where was the light?

"A. When he made the shouts then he fell on the lamp and as he had it I see him in this position (indicating left hand crouched underneath his body or bent forward against his body), and I went to help him.

"Q. Just prior to the time yau heard him shout, what did you see him do with reference to the light?

"A. He picked up the light to put it from one side to the other.

"Q. Did you see where he grasped the light, at what point he grasped the light?

"A. Around the socket on the wire, partly held the socket and the wire.

"Q. And as he did that what did you hear and see, tell us again what you heard and saw?

"A. I saw after he grabbed the light when he went in the grating the sparks of electricity on the grating.

"Q. That is, you saw the sparks fly between the grating and the light, was that when he fell you saw sparks fly?

"A. Yes, sir.

"Q. That is, he was moving the lamp and as he was moving the lamp with his hand grasped partly around the socket and while you heard him shout you saw him clasp the lamp up toward his breast and he fell down and broke the lamp, is that right?

"A. When he grabbed the lamp he shouted first and the electricity [fol. 54] made him jump, crouching up his body, and he fell on one side on the grating.

"Mr. Rogers:

"Q. Still holding the lamp to his chest, was he?

"A. When he fell he broke the globe.

"Q. As he fell, did he fall holding the lamp against his breast that way?

"A. Yes, sir, as he fell he broke the globe.

"Q. As he fell he fell with the lamp against his chest and then broke the globe when he fell on the floor, is that it, with his body?

"—. On the grating.

"Q. Did the bulb break as he crushed it against his breast or did it break as he struck the grating?

"A. On the grating.

"Q. Then the body fell on the globe on the grating?

"A. Yes, sir.

"Q. Did he fall with the globe between his body and the grating?

"A. Yes, sir.

"Q. Then what did you do?

"A. I shouted to the other coalpasser to pull the wire.

"Q. And did you see him pull it?

"A. Yes, sir. We were in the dark with the exception of a little light that I have, my small globe.

"Q. Did you have a light in your half of the firebox?

"A. Yes.

"Q. Was it an electric light?

"A. Yes.

"Q. Who was it pulled the wire out when you yelled to pull it out, what is his name?

"A. Louis Gonzales.

"Q. That is the first witness here today?

"A. Yes, sir.

"Q. Did you see who brought the wire and bulb which Sanchez used that morning?

"A. The watertender brought the light and wire cable.

[fol. 55] "Q. What is the watertender's name?

"A. I do not know the name, but I know him.

"By Mr. Rogers:

"Q. What is he,—Mexican, South American, or what?

"A. He is Central American.

"Q. Do you know where he is now?

"A. Went on the voyage on the steamer.

"Q. Did you see him connect up the wire with the socket in the fireroom?

"A. I saw the man that connected my light, but I did not see the man connect the other light because I was on one side and Sanchez was on the other.

"Q. When did you see this light that Sanchez used for the first time?

"A. I saw him with it when he had it in the bolier and, after he was dead.

"Q. When Sanchez had this light in the firebox did you notice anything about the wire?

"A. No.

"Q. Did you examine the wire at any time prior to Sanchez's death?

"A. No.

"Q. Did you examine it after he died?

"A. Yes, afterwards, yes.

"Q. How soon after?

"A. Five minutes after his death.

"Q. That was before or after the watertender put the tape on the wire?

Mr. Rogers: I object to that question.

"A. At the very moment he was putting it on.

"Q. Were you present at the time?

"A. Yes.

"Q. Tell us what you saw and what happened then?

"A. I was left in the dark in the boiler, and he had his head stuck up in the bucket of cement, I was holding him.

"Q. Who had his head in the bucket?

"A. Sanchez.

[fol. 56] "Q. Sanchez had his head in a bucket of cement?

"A. Yes, sir.

"Q. Is that the position in which he fell?

"A. Yes.

"Q. And did you climb over the bridge to lift him up?

"A. Yes. When I saw him in that position I jumped over his body.

"Q. What did you do?

"A. To help him but as he felt the shock he shouted."

Mr. Wagner: I move to strike out the last part, that "as he felt the shock he shouted."

The Court: Yes, strike out "as he felt the shock he shouted."

"Q. Then what did you do?

"A. Then after, although I was in the dark, after the wire was pulled out, I held him, bringing his face up and calling him by his name, and asking what was the matter, two minutes after that at the moment I was sitting on half the bridge that he had built, and then he went and stretched out without saying a word.

"Q. That was in the firebox?

"A. Yes, sir.

"Q. And you were in the dark during these moments?

"A. Yes, sir.

"Q. And when he stretched out what did you do?

"A. I held him, I still held him.

"Q. Until what happened?

"A. Three minutes after that the watertender came in with a light, and then I told him to help me to get this man out,—and then when he found out through his eye that he was dead, the watertender called the engineer."

Mr. Wagner: I move to strike out "and then I told him to help [fol. 57] me to get this man out,—and then when we found out through his eye that he was dead."

The Court: Strike out "and then I told him to help me to get this man out."

"Q. When the watertender brought the light into the firebox while sitting there with Sanchez, did you notice anything about the light?

"A. No, I was not thinking of that at the time, I could not think of it.

"Q. When did you first notice the light and the wire after this happened?

"A. We took the man out and laid him on the floor and the engineer came and commenced to rub him and we tried to bring him back to life, then the engineer and watertender, myself and the other coalpasser examined the wire and then the Doctor came and he was the one that said he was dead.

"Mr. Rogers: Who was the engineer who examined the wire with you, was he a first or second engineer?

"A. There is the first, second and the chief, and he gave orders to take all the electric wires, and then the next day we finished the work with kerosene oil lamps."

Mr. Wagner: I move to strike that out.

The Court: "Then the next day we finished the work" is stricken out.

"Q. That is, the chief engineer gave orders to remove all wiring?

"A. First engineer gave orders to take all wires.

"Q. Did you notice at the time after Sanchez had been brought out and was laid on the floor,—did you notice anything about the wire having been covered with tape?

[fol. 58] "A. Yes. They had to examine the wire. They took it off and rolled it off again."

Mr. Wagner: I move to strike out "They had to examine the wire."

The Court: Strike out "They had to examine the wire."

"Q. Took what off?

"A. Unrolled the tape off to examine the wire."

Mr. Wagner: I move to strike out the latter part about unrolling the wire.

Mr. Graves: I consent on that,—both question and answer go out.

The Court: All right, both out.

"Mr. Rogers: Who did that?

"A. The watertender and the engineer.

"Q. Which engineer?

"A. The three were there.

"Q. Now, I want to know the chief engineer, second engineer or watertender?

"A. The watertender actually worked but the three were present.

"Q. I am trying to find the name of the chief engineer, or second engineer?
"A. The three were looking at it.
"Q. I know you said the watertender was there, and the chief engineer or second engineer, which was he,—chief or second engineer?
"A. The first engineer, the second engineer and the assistant.
"Q. Who was there at the time of the examination? Was the chief engineer there?
"A. Yes, sir.
"Q. Second engineer?
"A. Yes.
"Q. And was the watertender there?
"A. Yes, sir.
[fol. 59] "Q. Who actually unwound the tape from the wire and above?
"A. The watertender.
"Q. Did you see the wire after he had removed the tape?
"A. Yes.
"Q. Tell us what you saw about the wire?
"A. I saw the wire, it was in bad condition."

Mr. Wagner: I move to strike that out.
The Court: Strike it out, it was in bad condition.

"Q. What do you mean by that?
"A. It was uncovered and touched with the copper.
"Q. How much of the copper wire was uncovered?
"A. A piece about half an inch.
"Q. And where was that piece of wire with reference to the socket?
"A. Was close to it.
"Q. How close was it to the socket?
"A. About half an inch in distance.
"Q. Was it uncovered from the socket for half an inch from the socket?
"A. Yes, sir.
"Q. Was this wire uncovered on both sides of the wire, or was one side of the wire only uncovered?
"A. I saw only one side, I do not know what was on the other side. All I could see was on one side.
"Q. Was all you saw uncovered?
"A. Yes, sir. What I saw was uncovered.

"Cross-examination by Mr. Rogers:

"Q. What was done with the wire after the tape was unwound and the examination made by the chief engineer, second engineer and watertender?
"A. The watertender rolled it up again but then the policeman came and asked some questions and took the whole thing with him.
[fol. 60] "Q. The watertender rolled the tape around the wire before the policeman took it away?

"A. Yes, sir.
"Q. Was it adhesive tape or plain tape?
"A. The one that has the black, the kind that is adhesive.
"Q. When he unwound it how did he get it off if it was adhesive?
"A. It is the kind of adhesive that goes on and goes off.
"Q. Was it hard to unwound on account of the stickiness, as he took the tape off,—the watertender?
"A. No.
"Q. It came off easily and smoothly?
"A. Yes.
"Q. The tape did not stick as he unwound it and pulled it off?
"A. No.
"Q. When he wound it back after the examination that you spoke of, what held it there; did he tie a string around it or what?
"A. No, no.
"Q. What held the tape on the wire after it was wound back?
"A. The same composition that the thing has to stick.
"Q. Was it wound up on the brass socket or just up to the brass socket?
"A. It was wound up from the wire up to the part of the socket, on the same socket."

Mr. Graves: I will read the deposition of Cosme Sanchez. Said deposition *of* Mr. Graves was read as follows:

"Direct examination by Mr. Walzer:

"Q. What is your name?
"A. Cosme Sanchez.
"Q. Where do you live?
"A. In Puerto Cabello.
"Q. What country is that in?
"A. Venezuela.
"Q. Do you know Maximiliano Sanchez now deceased?
"A. Yes, why not, he is my brother.
[fol. 61] "Q. When did you last see Maximiliano Sanchez.
"A. About 6 months ago, something like that, when he left on the Steamship "General W. C. Gorgas", 6 or 8 months.
"Q. Are you acquainted with all the relatives of Maximiliano Sanchez?
"A. Yes, sir.
"Q. Did he leave any immediate relatives surviving him in the United States?
"A. Not here, no, sir.
"Q. Where do his relatives live?
"A. In Venezuela, Puerto Cabello.
"Q. That is the same place where you live?
"A. Yes, sir, the same.
"Q. Did he leave a mother surviving him?
"A. Yes, sir.
"Q. What is her name?
"A. Maria de las Nieves Sanchez.

"Q. How old is your mother?
"A. 56 years.
"Q. Did Maximiliano Sanchez leave him surviving a father?
"A. No, sir.
"Q. When did the father die?
"A. In 1903.
"Q. What was the name of the father?
"A. Marcelino Cuello Sanchez.
"Q. Did Maximiliano Sanchez leave him surviving any brothers or sisters?
"A. Yes, sir.
"Q. How many?
"A. Four.
"Q. How many brothers?
"A. Male one, two with myself.
"Q. And how many sister?
"A. Two.
"Q. Who is the oldest of the brothers?
"A. I.
"Q. How old are you?
"A. 35 years.
"Q. Are you married or single?
"A. Single. I am about to be married.
"Q. Are you engaged to be married?
"A. Yes, sir.
"Q. When do you expect to be married?
"A. I was about to do it in these months, but due to the death of [fol. 62] my brother I have to postpone it."

Mr. Wagner: I move to strike that out.
The Court: Strike it out.

"Q. Are you working?
"A. Yes, sir.
"Q. Who are you working for?
"A. I was working to save enough money for a home.
"Q. Are you presently employed?
"A. Yes, sir.
"Q. Who are you employed by,—what company?
"A. Venezuela Navigation Company.
"Q. Where is their principal office?
"A. Caracas.
"Q. Venezuela?
"A. Yes, sir.
"Q. Are you paid by the week or by the month?
"A. By the month.
"Q. How much do you get a month?
"A. $40.00. American money.
"Q. How much in Venezuelan money?
"A. 50 pesos.
"Q. What is the name of the younger brother?
"A. Angel Sanchez.

"Q. How old is he?
"A. 18 years.
"Q. Is he working?
"A. No.
"Q. Is he married?
"A. No, he is not old enough."

Mr. Wagner: I move to strike that out.
The Court: Strike out "he is not old enough."

"Q. Who does he live with?
"A. My mother.
"Q. Does he go to school, does he still go to school for an education?
"A. He was going to school where he was learning a trade and now it will have to be stopped."

[fol. 63] Mr. Wagner: I object to that as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Wagner: Exception.
I also move to strike out "now it will have to be stopped."
The Court: Strike that out.

"Q. Why was it stopped?
"A. On account of the death of my brother.
"Q. What is the name of the oldest sister?
"A. Carman Sanchez.
"Q. How old is she?
"A. 24.
"Q. Married or single?
"A. Single.
"Q. Is she working?
"A. No, house work.
"Q. She is not employed at any occupation where she makes a living?
"A. No, sir, none.
"Q. Who is she living with?
"A. With my mother.
"Q. What is the name of the younger daughter?
"A. Jorjina Sanchez.
"Q. How old is she?
"A. They are both of the same birth, twins.
"Q. Angel and Jorjina Sanchez are twins?
"A. Yes, sir.
"Mr. Woods: With your brother Angel?
"A. Yes, sir.
"Q. So she is likewise 18 years?
"A. Yes, sir.
"Q. Single or married?
"A. Single.
"Q. Going to school?
"A. She was learning how to sew, she cannot go now."

Mr. Wagner: I move to strike out the latter part of the answer.
The Court: Strike it out—"she cannot go now."

[fol. 64] "Q. Why?"

Mr. Wagner: I object to the question.
The Court: Objection sustained.

"Q. Is she employed in any occupation?
"A. No, she only does the housework.
"Q. Are you living with your mother?
"A. No, not now.
"Q. Where do you live?
"A. I live in the same city but I have another residence.
"Q. Are you boarding elsewhere?
"A. Yes, sir, a room outside, in some apartments outside.
"Q. So that the only children living with your mother now are Carman Sanchez, sister, age 24; Angel Sanchez, brother, age 18, years, and Jorjina Sanchez, sister, age 18 years; is that right?
"A. The three.
"Q. Prior to the death of Maximiliano Sanchez, you contributed to the support of your mother and three children living with her?
"A. He took care of the house and expenses and I helped when I could."

Mr. Wagner: You read "you", it should be "who."
The Court: Well, give us the question that is in the deposition that is on file.
Mr. Graves: Call it "you" then. You contributed to the support of your mother, and so forth.
Mr. Wagner: I move to strike out the first part of the answer that he read, to take care of the house and expenses.
The Court: Motion to strike out is denied
Mr. Wagner: Exception.

[fol. 65] "Q. Who is he?
"A. Maximiliano used to support my mother and the house."

Mr. Wagner: I object to the latter part of that answer as not responsive, and move to strike it out.
The Court: Motion denied; you are not the examining Counsel.

"Q. How much did he contribute to the support of your mother and the house and wour brother and sisters living with her?"

Mr. Wagner: I object to that on the ground that his witness is incompetent to testify to merely hearsay.
The Court: Well, you can't tell from her answer whether he knows or not. Your objection is overruled.
Mr. Wagner: Exception; may I renew it later if it is shown——
The Court: Yes.

"A. He gave always $50.00."

Mr. Wagner: I move to strike out the answer as not responsive.

The Court: Motion denied. Cross examination would reveal whether he was speaking of his own knowledge or not.

"Q. A month?
"A. Yes, and sometimes more; when he made more he sent more. If he made more he send more."

Mr. Wagner: Same motion, on the ground it is incompetent. It is not shown that he knew what the man did contribute or pay over to his mother.
[fol. 66] The Court: Motion denied.
Mr. Wagner: Exception.

"Q. But he contributed always $50 a month; is that right?
"A. Yes, more or less that is what he used to send."

Mr. Wagner: Same objection.
The Court: Same ruling and exception.

"Q. Is that an average amount that he would contribute a month?"

Mr. Wagner: I object to that.
The Court: Objection sustained.

"Q. What was the average amount, in your opinion, a month he contributed to the support of your mother and the house and sisters and brother?

"Mr. Woods: I object to your asking his opinion.
"Mr. Walzer: I change the question by striking out the words 'in your opinion'.

"A. Monthly?
"Q. Yes, sir.
"A. That depends on the state he was in. Sometimes if he had $100 he sent $70. All he ever made he made efforts to send money home."

Mr.Wagner: I mave to strike out all of that.
The Court: Stricken out.

"Q. Did he ever send less than $50 per month home?

Mr. Wagner: I object to that.
The Court: Overruled.

[fol. 67] "A. Yes, months when he was out of work.
"Q. Was that very often?
"A. No, only happened sometimes like two or three months.
"Q. Otherwise he sent $50 per month?"

Mr. Wagner: Same objection.
The Court: Same ruling and exception.

"A. Yes, sir.

"Q. What is the condition of your mother to-day with regard to her health?
"A. Very bad.
"Q. Is she suffering from any ailment?
"A. Rheumatism very bad."

Mr. Wagner: I object to that on the ground that this witness is not competent to testify as to what his mother was suffering from.
The Court: Objection sustained.

"Q. Can she do the housework?"

Mr. Wagner: I object to that as calling for a conclusion of the witness.
The Court: Objection sustained.

"Q. What does she do all day?"

Mr. Wagner: I object to that; he is not competent to testify; he was working on board ship.
Mr. Graves: If it please your Honor, this man lives down in Venezuela in the same home town, does not work on any ship at all.
The Court: Is it material what the mother does?
Mr. Graves: What does she do all day?
[fol. 68] The Court: Is it material? Objection overruled.
Mr. Wagner: Exception.

"A. She does a very light work, she very seldom sweeps or does any of the housework.
"Q. Who does the housework?
"A. The sisters.
"Q. Is your mother taking any treatment by any doctor?"

Mr. Wagner: I object to that; the witness is incompetent to testify what she was doing; he says he was not living at home.
The Court: Objection overruled.

"A. Now she is not being attended to by any doctor.
"Q. Was she attended to by any doctor until recently?
"A. Yes, sir; lately; yes, sir.
"Q. Who is contributing to the support of your mother and the children living with her at present?"

Mr. Wagner: I object to that as having no bearing on the issues in this case who is supporting her now.
The Court: Objection sustained.

"Q. You paid the rent after the death of Maximiliano Sanchez?
"A. Yes, sir."

Mr. Wagner: I object to that.
The Court: Objection sustained and the answer is stricken out.

"Q. What is the rent for the house they are occupying?
"A. $8.00 every two weeks.

[fol. 69] 'Q. Did you say you were engaged to be married?
"A. Yes, sir."

Mr. Wagner: I move to strike that out as not responsive.
The Court: I think it is responsive. Motion denied.
Mr. Wagner: Exception.

"Q. When did you arrive in the United States?
"A. On the Steamship "Philadelphia."
"Q. When?
"A. On Monday, the first.
"Q. Of this month?
"A. Of this month; yes, sir.
"Q. How soon do you expect to return home?
"A. As quickly as I can, as soon as possible.
"Q. Did you come here especially to testify in this case?
"A. I came authorized by my mother to represent her.
"Q. Did you get leave of absence from your employer?
"A. Yes, sir, the company gave me permission to come.
"Q. What is the condition of the health of your sisters?
"A. They are all well, my mother is the only one sick.
"Q. Is your brother Angel Sanchez well?
"A. Yes, sir, well.
"—. Prior to the death of Maximiliano Sanchez was he well and in good health?
"A. Who; do you mean Maximiliano?
"Q. Yes, sir, prior to his death?
"A. Yes, sir, strong.
"Q. Always healthy and strong as far as you know?
"A. Yes, sir, always strong and healthy, never had any sickness or went to a hospital at any time.
[fol. 70] "Q. What was his usual occupation?
"A. Working as a fireman.
"Q. On seagoing vessels?
"A. Yes, sir.
"Q. How much did he earn a month as an average on seagoing vessels?"

Mr. Wagner: I object to that as incompetent. This witness is incompetent to testify what his brother received on seagoing vessels.
The Court: Objection sustained. Is there anything in the deposition giving the age of the deceased?
Mr. Graves: It is not in here. He says this man is 35 and he is younger. I will try to prove it later by friends of the deceased.
Mr. Wagner: I renew my motion to strike out all the testimony of this witness as to what money was paid by the deceased to his mother.
The Court: All testimony of that witness in which he purported to state how much was given to the household down there will be stricken out and disregarded.
Mr. Wagner read the cross-examination of the witness as follows:

"Q. What kind of work do you do for the Venezuela Navigation Company?

"A. As a second engineer in the steamer.

"Q. When your father died did he not leave any property?

"A. Absolutely nothing.

"Q. How do you know how much your brother, Maximiliano, give to the mother and children?

"A. Because my mother always told me.

"Q. Do you know how much it costs to support the family and their house?

[fol. 71] "A. It all depends, because there are times when poor people have to make things meet.

"Q. That means that you do not know?

"A. More or less, about $2. they need in the house.

"Q. A day?

"A. A day; yes, sir.

"Q. For the mother and three children?

"A. And the rent.

"Q. Does the $2 a day include the rent?

"A. Very economically to be satisfied but just to pass.

"Q. Does the $2 include the rent?

"A. Yes, sir.

"Mr. Walzer: Does it include clothing?

"No, no, no.

"Q. Do you know how much it costs to clothe the family?

"A. If you buy a piece of goods it costs about $10.00.

"Q. A suit of clothes?

"A. A girl's dress, dress for a woman.

"Q. Your mother is not married at this time, is she?

"No, sir.

"Q. How much have you been giving to the support of your mother and the three children living with her?

"A. My salary I give now.

"Q. All of it?

"A. Until I came here; yes, sir.

"Q. Since when?

"A. Since the second day that he died a month more or less, because as she was always waiting to receive money from him.

"Q. How much did you give, if anything, before your brother died?

"A. Before my brother died, I used to give something, something like $8 or $10 a month.

"Q. Every month?

"A. Yes, sir; every month gave $8 or $10.

"Q. Did you say your brother Angel was going to school?

"A. Yes, sir, he is learning the arts and trades.

[fol. 72] "Q. Does he have to pay his tuition?

"A. No, he does not have to pay any tuition but she has to feed and dress him well.

"Q. He is not employed at the present time?

"A. No.
"Q. Is he still going to school?
"A. No, he cannot go now. He left there and he is taking care of mother.
"Q. What does he have to do to take care of mother?
"A. She is very sick with rheumatism and he has to take care of things around the house.
"Q. Neither of the two girls are employed?
"A. Only the housework home.
"Q. And still the boy has to stay home and take care of the house?
"A. Because he has to be in the house; because she is suffering much from the death of my brother.
"Q. What does he have to do?
"A. All the errands to do and things.
"Q. Why cannot the sisters do the errands?
"A. That is not the custom in our country.
"Q. You mean that the sisters do not leave the house?
"A. No, sir; they do not go out.
"Q. Your sister Jorjina you say has been learning to sew and she cannot go now; does she have to pay for her tuition?
"A. No, they do not pay anything at that school.
"Q. Why does she have to stay at home now?
"A. It is the custom that when a person is so ill as my mother, is not to leave her alone in the house for anything that may happen.
"Q. Did your mother give you written authority to represent her, or just tell you to represent her?
"A. She gave me some papers, a document.

Mr. Walser: Where is that document?
"A. I have it.
[fol. 73] "Q. Let me see it?
"A. (Witness hands letter to Mr. Walzer.)

Mr. Walzer: I offer this in evidence and mark it Plaintiff's Exhibit 1 for identification.

"Q. You have no objection to leave this here for the purpose of the case, have you?
"A. You mean that I should go without it?
"Q. Yes, sir.
"A. I will think it over.
"Q. You have not given up the power of attorney or document that you have received from your mother as yet?
"A. No, sir.
"Q. Do you know who prepared this document?
"A. Yes, sir.
"Q. Who did—if you know?
"A. Doctor Padilla.
"Q. Do you know Doctor Padilla?
"A. Yes, sir, I know him.
"Q. Did your mother consult Dr. Padilla about this accident?

"A. Yes, sir.
"Q. When did you first hear of your brother's death?
"A. The letter with the date is in my valise.
"Mr. Walzer: The letter with the date?
"A. Yes, sir, the letter with the date is in my valise.
"Q. What letter is that?
"A. A letter I received from a friend here giving me the news of the death.
"Q. What friend was this?
"A. Agapito Vasquez.
"Q. Is Agapito a friend of yours?
"A. Yes, sir.
[fol. 74] "Q. How long have you known him?
"A. Many years. He is from Venezuela.
"Q. Does this letter from Vasquez tell just how your brother died?
"A. No, that letter does not say that, but another letter says—the letter explained how he died.
"Q. What do you mean by saying 'No, that letter does not say that, but another letter says'?
"A. After the letter from Agapito, we received another letter from a man by the name of Marcano.
"Q. Is that someone you know?
"A. Yes, sir.
"Q. Does he live here in New York?
"A. No, sir, he does not live in New York, he is in Cuerosal.
"Q. How does he say that he knew about the accident?
"A. Because he left here after the accident.
"Q. In this letter from Vasquez did he tell you that he was going to ask to be appointed administrator?
"A. Yes, sir.
"Q. Did he tell you that your brother owed him any money?
"A. Yes, we are aware of the fact that he owed him money.
"Q. Did he tell you that he expects to take the debt that your brother owed him out of the fund that he recovered in this suit if there is anything recovered?
"A. He did not say that. He said that he owed money; yes; and that he had claimed the money that he owed from the company, and if there was anything left, of course, it was for the mother.
"Q. You have not had any talk with the Venezuelan Consul, have you?
"A. I just went to the Consul to tell him that I came here to represent this.
[fol. 75] "Q. Had you engaged any attorney to represent the rights of your mother and any other relatives that might have rights in this case?
"A. I have come here to explain the case to this gentleman (indicating Mr. Walzer of Frederick R. Graves' office).
"Q. You have not engaged any attorney?
"A. Not as yet, no.
"Q. Do you know whether your mother has?
"A. My mother has not made any, no.

"Q. Do you know whether your brother, Angel, or your sisters have?

"A. No, sir, none.

"Q. Do you know whether any of the family has asked anyone to act as administrator of the estate of your brother?

"A. No, sir.

"Q. Do you know that Vasquez has filed a document which claims to be letters of administration?

"Mr. Walzer: I object to the question as immaterial, irrelevant and incompetent and entirely improper.

"A. Yes, I know it.

"Q. Do you know, or to your knowledge, does any of the family know, that suit has been brought by Vasquez against the Panama Railroad Company on the ground of your brother's death?

"A. Yes, we are aware of that.

"Q. How did you learn it?

"A. Because he told us.

"Q. Did he tell that in the letter that gave news of your brother's death?

"A. Yes, sir.

"Q. Do you know what date your brother died?

"A. The 26th of August.

"Q. Did Vasquez say he had brought suit or he was going to bring suit?

"A. He was going to hold it until one of us would come here.

[fol. 76] "Q. He was not going to bring suit until one of you came here?

"A. Yes, sir.

"Q. I do not suppose that Vasquez told you that he had no legal right to collect a single cent or dollar out of any recovery that could be had for any money that your brother owed him while he was alive, did he?

"A. You mean the money that my brother owed him?

"Q. I mean, did he tell you that he had no right and never did have any right to a single cent for debts that your brother owed him to be taken out in a recovery in action for your brother's death?

"Mr. Walzer: I object to the question as immaterial, incompetent and irrelevant and not a proper statement of law.

"A. He never told me anything like that.

"Q. Did Vasquez tell you that he had spent money for funeral expenses?

"A. No, sir.

"Q. Did he tell you that he was going to spend money for funeral expenses?

"A. He was going to spend money to keep him in the house but there was no time for it. He could not do it, he had no time.

"Mr. Walzer: Do you not mean after he died?

"A. Yes, sir, after he died.

"Q. Do you know, or does any of the family know, that Congress

has appropriated a fund for relatives of men who die in the service of the Panama Railroad Company?"

Mr. Graves: I object to all that line as grossly immaterial.
The Court: Objection sustained.
Mr. Wagner: Exception.

[fol. 77] "Q. Has any one advised your mother or yourself or any of the family that under some circumstances dependent relatives of a man killed in the service of the Panama Railroad Company are being paid substantial sums on application to the Governor of the Panama Canal without any suit and without any lawyer?"

Mr. Graves: Objected to.
The Court: Objection sustained.
Mr. Wagner: Exception.

"Q. But you do not know where that money comes from, whether from a fund appropriated by Congress or some other sources, do you?"

Mr. Graves: Objected to.
The Court: Objection sustained.
Mr. Wagner: Exception.

Redirect examination by Mr. Graves was read as follows:

"Q. What did you say was the age of Maximiliano Sanchez at the time of his death?
"A. 32 years.
"Q. You stated on cross-examination that it would cost at least $2 per day for the support of your mother and family living with her, is that correct?
"A Yes, sir, $2.00.
"Q. Does that cover only rent and food?
"A. The rent and food.
"Q. Vasquez has been friendly with your family for years, has he?
"A. Yes, sir.
"Q. You always considered him a good friend of yours, did you not?
"A. Yes, sir.
[fol. 78] "Q. What is the custom in Venezuela with regard to girls being employed prior to their being married?"

Mr. Wagner: I object to that.
The Court: Objection sustained.

(Whereupon, at 1:00 o'clock p. m., a recess was taken until 2:00 o'clock p. m.)

April 25, 1923.

Afternoon Session

ARGUMENT OF COUNSEL

Mr. Graves: I offer in evidence the letters of administration issued by the Surrogates Court of Knigs County.

Mr. Wagner: I object on the ground that it is established by the testimony here that this decdent was not a resident of the County of Kings and there is nothing to show that the Surrogates Court had any jurisdiction of this man or his administrator at the time of the issuance of the letters.

The Court: Objection overruled.

Mr. Wagner: Exception.

(The paper was marked Plaintiff's Exhibit 2, in evidence.)

[fol. 79] AGAPITO VASQUES, sworn in his own behalf, testified as follows (through an interpreter):

Direct examination by Mr. Graves:

Q. Mr. Vasques, did you know Maximiliano Sanchez?
A. Yes, sir.
Q. How long did you know him?
A. When he died, I had known him eight years.
Q. Did you come from the same country where he came from?
A. Yes, sir.
Q. And the same town?
A. No, sir.
Q. Did you know any of his family?
A. Yes, sir
Q. Who are his family?
A. Marie Nieve Sanchez, his mother.
Q. Who else?
A. Gomez Sanchez, his brother.
Q. Who else?
A. Carmen Sanchez, his sister.
Q. Who else?
A. Angel Sanchez, his brother.
Q. Who else?
A. Jorjina Sanchez, his sister.
Q. What has your business been in Brooklyn?
A. I have had a boarding house and I have been working on the docks.
Q. What kind of people did you have in your boarding house?
A. I had Venezuelans, Porto Ricans and all kinds.
Q. What sort of people were they, what was their business?

Mr. Wagner: I object to that.

A. Sailors.

Mr. Wagner: I move to strike that out.
The Court: Motion denied.

Q. Did you ever have anything to do with sending money for Maximiliano Sanchez to his people in Venezuela?

[fol. 80] Mr. Wagner: I object to that.
The Court: What is the purpose of that?
Mr. Graves: To show the support, in addition to other testimony, that money was sent by carriers, different people of that nationality when they went to that town. This man ran a boarding house and he would pick out sailors that were going to take a trip to that town, when it was sent by hand: to show it was the custom at that time.
The Court: Objection overruled.
Mr. Wagner: It is also objected to on the ground that the defendant has not up to this time shown the purpose, whether it was in payment of debts, or how?
The Court: Objection overruled.
Mr. Wagner: Exception.

(Question was read as above recorded.)

Q. Yes or no, that is all.
A. Yes, sir.
Q. Just tell us in your own words what you did in that respect?

Mr. Wagner: I object on the same ground; it is not a proper manner of proving any contribution to the support, simply the sending of some money.
The Court: Overruled. There has been testimony that he paid some money to her. This is corroborative of some money having got there.

A. To his family?
Q. Yes.
A. Because he used to give the money to send it to his family.

[fol. 81] Mr. Wagner: I move to strike that out.
The Court: Stricken out.

(Question was repeated as above recorded.)

A. With regard to what?
Q. With regard to sending money, tell us what you did?
A. Because he used to give it to me to send to his mother.

Mr. Wagner: I move to strike it out.
The Court: Tell us what it is without any explanation or characterization.

A. I sent the money with my friends, they used to travel in that direction.
Q. And during what period of time did you do that? When did you first begin to do that?
A. When was the last time?

Mr. Wagner: I object on the same ground as before.
The Court: Same ruling and exception.

A. I stopped doing it when he died, and I do not remember when I started.
Q. Well, about when did you start?
A. More or less, in the year 1920 or 1921.
Q. How much money during that period of time did you send by these seamen you have mentioned on behalf of Maximiliano Sanchez?

Mr. Wagner: Same objection.
The Court: Same ruling and exception.

A. I remember once I sent him $100 with one boat, in another one $80, in another $50; I don't remember more.
[fol. 82] Q. Were there other times?
A. Several times, ten or fifteen times.
Q. Who were the men that you sent the money by?
A. Once I sent $100 with a boy by the name of Bernardo Calazar.
Q. Where did you get this money that you sent?

Mr. Wagner: Same objection.
The Court: Same ruling and exception.

A. Maximiliano himself gave me that.
Q. What did he tell you when he gave it to you?
A. I leave this money with you to send it to my mother.

Mr. Wagner: I move to strike it out as not binding on the defendant, what was told this man.
The Court: Motion denied.
Mr. Wagner: Exception.

Cross-examination by Mr. Wagner:

Q. Where did Maximiliana live at the time of his death?
A. 117 Van Dyck Street.
Q. Where is that?
A. Where the railroad ends.
Q. What city is that in or what county is that in?
A. Brooklyn.
Q. How long did he live there?
A. He lived there about six months.
Q. Is that the place where you live?
A. No, I do not live there, I did live there when he died.
Q. Had he been ever on ships during that six months?
A. Yes, sir.

Mr. Graves: If the Court please, just to cut down the time, it seems to me in the first place you can't attack letters of administration [fol. 83] collaterally; it seems to me it must be in the Surrogates Court.

The Court: Oh, yes, he can attack them here. There is a case on that in the Appellate Division.

Q. At the time of the death of Sanchez, did he owe you some money?

A. Yes, sir.

Q. How long was it that he owed you this money?

A. Since he lived in my house.

Q. And he owed you this money all the time that he lived in your house?

A. Yes, sir.

Q. And that was for six months before he died?

A. What?

Q. The question is: did he owe you the money?

A. As he was my friend I allowed him to owe me the money and send the money to his mother.

Mr. Wagner: I move to strike out the answer as not responsive.

The Court: What is your question? The answer is stricken out.

Q. (Question was read as above recorded.)

A. All the time he lived in my house.

Q. Did he live in your house during the year 1920?

A. Yes, sir.

Q. Did he owe you some money in 1920?

A. Yes, sir.

The Court: What is the difference,—whether he owed him money or not?

Mr. Wagner: It is a question of veracity. He would not take this man's money to send away when he still owed this man money.

The Court: What did he owe you the money for? For board? [fol. 84] The Witness: To eat and sleep, and I loaned him money too, to send to his family.

Mr. Wagner: I move to strike out that last part,—that he loaned him money to send to his family.

The Court: The motion is denied. I asked him what he owed the money for.

Q. Do you know when he first sent that first $100 to the family of this deceased?

A. I do not remember the date.

Q. Do you remember the date when you sent the $80 to him?

A. Neither.

Q. Do you remember the date when you sent the $50 or any other money?

A. No, sir.

Q. Was that in the year 1920?

A. From 1920 to 1921.

Q. Do you know what part of the year 1920 you sent the first amount?

A. No, sir.

Q. Was it the first part or the last part of 1920?

A. The latter part.
Q. Was it in the month of July or August?
A. I do not remember what month.
Q. Did you send any in the year 1919?
A. No, sir.
Q. Did you send any before the year 1920?
A. No, sir.
Q. Do you know the whole amount that you ever sent to him?
A. Of what I sent him, yes.
Q. What is the whole amount that you sent?
A. I — him $100, $80 and $50.
Q. Is that all that you ever sent?
A. All I sent, yes.
Q. That is the total amount?
A. What I sent, yes; what he sent, I don't know.
[fol. 85] Q. Do you know when is the last time that you sent any part of that money to him?
A. No, sir.
Q. Do you know how long it was before this man died?
A. No, sir.
Q. Was it the first part of the year 1921?
A. I do not remember.
Q. Do you have any memorandum of any kind or paper that shows when you sent this money?
A. No, sir, but I have a witness with whom I sent the money.

Mr. Wagner: I move to strike out the latter part of that answer.
The Court: Strike it out. The jury will disregard it.

Q. Are those witnesses in court; are those friends of yours in court?
A. Only one.
Q. Did you talk this matter over with him?
A. No, sir.
Q. Haven't talked about the money you sent to Sanchez at all?
A. I did ask him whether he remembered bringing the money and he said yes.
Q. When did you ask him?
A. Yesterday when he arrived.
Q. Did you ask him any time before yesterday?
A. No, sir, yesterday.
Q. Haven't spoken to him about it from the time you sent the money until yesterday?
A. Yes, sir.
Q. And did he tell you what day it was you sent the money?
A. No, sir.
Q. Did you talk over how much you sent?
A. No, sir, asked him whether he remembered it and he said yes.
Q. You didn't speak of the amount of money that you sent with him?

A. No, sir.

[fol. 86] Q. The only thing that you talked about when you saw him yesterday was whether or not he had taken some money from you; is that right?

The Court: Well, you have covered that a couple of times now.

Mr. Wagner: This witness does not understand English.

The Court: I understand that; you have exhausted him on that point.

Q. Did you talk this matter over with Mr. Graves?

A. No, sir.

Q. Never talked with Mr. Graves about this money you sent down there?

A. Yes, sir.

Q. When?

A. When I had conferences with him.

Q. When was the last time you talked to him about any money you sent?

A. I have gone there so often that I do not remember.

Q. When you say "often," how many times do you mean that you went over to his office?

A. I do not remember how often.

Q. When is the last time you talked to him about this?

A. Yesterday.

Q. Did you talk to him today since the court adjourned at 1 o'clock?

A. No, sir.

Redirect examination by Mr. Graves:

Q. You don't speak any English, do you?

A. No, sir.

[fol. 87] FILIPE RAMOS, residing at 99 Commerce street, Brooklyn, a witness for the plaintiff, being duly sworn, testified (through an interpreter) as follows:

Direct examination by Mr. Graves:

Q. Do you speak any English?

A. No.

Q. How old are you?

A. 33 years.

Q. What is your nationality?

A. Venezuelan.

Q. Did you know Maximiliano Sanchez?

A. A very good friend of mine.

Q. How long have you known him?

A. I know him in 1915 in Porto Cabello.

Q. Were you and he ever shipmates together on the same ship?

A. In the steamer "Caracas," in Philadelphia.
Q. And where does the steamer "Caracas" run to?
A. From here to San Juan, Porto Rico.
Q. Did you know Sanchez' mother?
A. Yes, sir.
Q. Where did you know her?
A. In Porto Cabello.
Q. Did Sanchez ever send anybody by you to his mother?

Mr. Wagner: I object to the question, I object to the form of the question.
The Court: Overruled.
Mr. Wagner: Exception.

A. Yes, sir.
Q. How many times did he do that and how much did he give you at each time?
A. In the Red D Line, I make seven trips to Venezuela and he gave me money three different times; he himself personally gave it to me.
[fol. 88] Q. Please tell us what year that occurred in?
A. In 1919 he gave me money two different times.
Q. Give us the month and the amount each time?
A. The trips that I made are in the record of the Shipping Commissioner.
Q. But can you give us what month it was in in 1919?
A. I do not remember, it was some time ago.
Q. How much money did you take the first time in 1919 and how much money the second time in 1919?
A. The first time he gave me here $25.
Q. And how much the second time?
A. $50.
Q. And how far apart were those two trips?

Mr. Wagner: I object to the question on the ground that the witness has already said he does not know.
The Court: Overruled.
Mr. Wagner: Exception.
The Court: He said he didn't know what month, he said he didn't know how far apart they were.

Q. About how far apart were the two trips that you made when you took money in 1919?
A. It so happened about four or five months, more or less, but in the beginning of the following year $100."

Mr. Wagner: I move to strike that out.
The Court: Strike out "in the beginning of the following year $100."

Q. Did you take any money in 1920?
A. In 1920, $100.
Q. And do you remember what month that was in?

A. No, I do not remember.
[fol. 89] Q. Do you remember what boat you traveled on?
A. The first time I was in the "Philadelphia" and the second time I was in the "Caracas."
Q. They are both of the same company, aren't they?
A. Yes, the same Red D Line.
Q. Now, how long have you been going to sea?
A. Since 1914.
Q. Have you ever worked as a fireman?
A. I am fireman, that is my job; I have my discharge in my pocket.
Q. How many different boats have you fired on since 1914?
A. In 1914 I was traveling around in my own country.
Q. Well, since then, how many boats have you worked on?
A. Around my country I worked in a good many. Since here in 1916 I have been working in steamers around here.

The Court: How many?
The Witness: In 1917 I have been in at least I should say 13 boats.

Q. And did you sometimes take more than one trip on the same boat?
A. Yes.
Q. How many trips have you taken on the "Philadelphia"?
A. In the "Philadelphia" made two trips.
Q. How many on the Caracas?
A. In the Caracas I made three trips.
Q. Now, did they use portable lights in the fireroom on the American boat that you were on?
A. You mean those with a string?
Q. Portable lights on a wire that you carry around?
A. To work with when we are in port we have two of them.
Q. Can you tell us what the general custom was with regard [fol. 90] to the kind of portable lights that were used on these various boats that you worked on?

Mr. Wagner: I object to that on the ground that it is immaterial, what kind are used on another boat.
The Court: Objection overruled.
Mr. Wagner: Exception.

A. Certainly.
Q. Now, I hand you Plaintiff's Exhibit 1 and ask you if you have ever seen those generally in use?

Mr. Wagner: I object to the form of that question.
The Court: Sustained; let the witness tell us what kind of lights they used.

Q. Just tell us what kind of portable lights they used customarily on the American boats you worked on?
A. Why, if the boat is at sea——

The Court: Never mind that; just tell us what kind of a portable lamp, describe the kind and its construction and shape?

A. To work in the port?
Q. Well, port or at sea?
A. To work in the room we get those lamps that have a little head on and have an electric cable attached to it.
Q. On these lamps that you use what did they have at the place where you hold the light, next to the bulb?
A. They generally put a mask of iron.
Q. Well, did they have any wooden handles?
A. Yes, sir, made out of wood.
Q. I show you Plaintiff's Exhibit 1 and ask you if that is the [fol. 91] kind of contrivance that was generally in use in the American boats that you were on?

Mr. Wagner: I object to the question on the ground that it is utterly immaterial in this case for the reason that the negligence alleged is a broken cable and not the form of the lamp.
Mr. Graves: We have alleged defective appliances in general.
The Court: Unsafe lighting appliances, unsafe lighting.
Mr. Wagner: The allegation as to the cause of death was unsafe wiring.
Mr. Graves: Unsafe appliances.
The Court: Overruled.

Q. Go ahead?
A. This very one; yes, sir, these are the kind.

Cross-examination by Mr. Wagner:

Q. You stated that that is the kind of light they used in rooms on board boats, is that right?
A. This is the wire we use when the boat is in port.
Q. Did you ever see any other kind of lamps used?
A. To work, only those.
Q. Never saw any other kind of lamps except that particular style of lamp used on any boat?
A. No, sir.
Q. Did you ever see any lights used that didn't have a handle on in any of the boats you have worked on?
A. Very large ones like that.
Q. But this is the only portable lamp you have ever seen?
A. To work in ports, yes, sir.
Q. And that is the most improved lamp that is used on any boat, is it not?
A. Yes, sir, because you can never break the bulb.
[fol. 92] Q. You know the last witness, Agapito Vasques?
A. I know him so.
Q. Do you stop at his boarding house?
A. Yes, sir.
Q. How long have you known him?
A. I know him since 1918.

Q. Did you talk over this case with him?
A. No, sir.
Q. When did you see him before you came to court today?
A. In the house.
Q. When?
A. The day before yesterday.
Q. Did you speak to him about this case at all?
A. I was working in my factory, because I work now in a factory.
Q. Did you speak to him about this case when you saw him the day before yesterday?
A. Mr. Maximiliano Sanchez was a friend of mine and he worked with me——

Mr. Wagner: I move to strike out all that, and just ask him the one question: did you speak to Mr. Vasques the last time you saw him before he came to court today?
A. We did.
Q. Vasques?
A. Yes, sir.
Q. When did you speak to him?
A. The day before yesterday.
Q. Did you tell him about this case?
A. Yes, sir.
Q. Did you tell him that you were going to testify here about paying money down to the mother of Sanchez?
A. Certainly, naturally.
Q. Now, you stated that when you were on the Red D Line that this man had on three different occasions given you some money; [fol. 93] how many times did he give you money while you were on the "Philadelphia"?
A. He gave me money twice.
Q. On the "Philadelphia"?
A. Yes.
Q. And he and you were both working at that time on the "Philadelphia"?
A. We made one trip and he then remained on the other trip.
Q. Was it while on that trip that he made that he gave you the money?
A. No, he stayed off to go to the Panama Line.
Q. Now, where does the "Philadelphia" land,—anywhere near Venezuela?

The Court: Where does the Philadelphia arrive down there in port?

Q. What port does it enter from New York?
A. From here to San Juan, Porto Rico.
Q. Does it touch Venezuela at all?
A. Pumaca, Laguaya.
Q. Where is Porto Cabello?

The Court: What country is it in?

A. In Venezuela.
Q. Is that the place where Sanchez lived?
A. Yes, sir.
Q. Now, was he with you on the "Caracas"?
A. No, on the "Philadelphia."
Q. He didn't work at any time on the "Caracas"?
A. With me, no.
Q. How long was it after you left the "Philadelphia" that you went on the "Caracas"?
A. About three months.
Q. Were you working with Sanchez during that three months?
A. After I left the Red D Line, I went to the Panama Line.
Q. And Sanchez worked on the Panama Line with you?
A. Yes, sir.
[fol. 94] Q. How long did you work on the Panama Line before you went back on the "Caracas"?
A. I left the Red D Line and, I didn't work any more there.
Q. Then you worked on the "Caracas" before you worked on the "Philadelphia"; is that right?
A. No, on the "Philadelphia" first and the "Caracas" afterward.
Q. Well, did you leave the "Philadelphia" and go right on the "Caracas" to work?
A. After three or four months.
Q. Now, during that three or four months did Sanchez work with you on the Panama Line?
A. Yes, sir.
Q. And did Sanchez go to work on the "Caracas"?
A. That I do not know.
Q. He might have worked there?
A. I do not know; he had his discharge papers, I do not know.
Q. In other words, you don't remember whether he worked on the "Caracas" or not?
A. No.
Q. Do you remember the month in 1920 when you say he gave you $100 to take down to his family?
A. It was in the beginning of 1920, the month, I do not remember
Q. Was any of that money given to you by Vasques?
A. Maximiliano himself gave it to me personally.
Q. Where were you at the time he gave it to you?
A. I left the dock to go and purchase some clothes.

The Court: Where was he,—in a house, in a room, in boat,—where was he?
The Witness: On the steamer.

Q. What steamer?
A. The "Caracas."
Q. Was he working on the steamer at the time?
A. No, in the "Caracas," no.
[fol. 95] Q. Did you talk this matter over with Mr. Graves?
A. No.
Q. Never talked it over with Mr. Graves at all?
A. I don't know him.

Q. Never had anything to say to Mr. Graves about this case?
A. I know Mr. Graves today.
Q. You never spoke to him before?
A. No, sir, never before.

FELIX RIVERS, a witness called on behalf of the Plaintiff, residing at 25 Columbia street, Brooklyn, being duly sworn, testified as follows:

Direct examination by Mr. Graves:

Q. Mr. Rivers, what is your business?
A. My business is sea going.
Q. How many years have you been going to sea?
A. I have been going to sea 14 years.
Q. Did you know Maximiliano Sanchez?
A. I knew him when I came to Baltimore in 1919 and I used to see him several times in the house.
Q. What country did you come from?
A. I am a Porto Rican.
Q. How many American boats have you worked on since you have been going to sea?
A. Since I have been going to sea I remember I worked in about thirty ships, American ships.
Q. Did you take the same voyage on some ships more than once?
A. Yes, sir.
Q. Do you know what is customary on American boats while you worked on them in regard to portable lights; yes, or no, do you know what the custom was?
A. Yes.
[fol. 96] Q. Will you tell us what was customarily used in the way of portable lights on the boats that you worked on?
A. In the boats that done work on boilers and furnaces where I always have a wire light framed by a wire cage and a wood handle.

Mr. Wagner: I move to strike out the answer as to what he has where he works.
The Court: Motion denied. It is quite apparent what the witness means what he worked with on the boat.

Q. I show you Plaintiff's Exhibit 1 and ask you if this was the kind of lights that are generally in use?

The Court: On the boats you worked on?
A. Yes, this is the light that I have all my own work when I did work in furnaces and boilers, and besides this we used to have it covered up with cables and rubber.
Q. Cables and rubber?
A. Yes, sir.
Q. Where, show us where?
A. Over in the end.
Q. You mean where the cable enters the wooden handle?

A. It is wound with rubber and a piece of canvas over the wooden handle.

Q. And was that to keep the water from getting in?

Mr. Wagner: I object to that as calling for a conclusion.

Mr. Graves: All right; I will withdraw it.

Q. Have you ever worked on ships of the Panama Line?

A. No, sir.

[fol. 97] Q. Did you ever have anything to do with taking money home?

A. No, sir, I never did.

Cross-examination by Mr. Wagner:

Q. Did you ever see any other kind of lights used on board a ship besides this light?

A. Besides that light, according to American ships?

The Court: No, did you ever see, yes or no, portable lights other than that type?

A. Yes, I saw candles, kerosene and gasolene .

Q. Did you ever see any portable electric lights that didn't have a handle on them?

A. Yes, sir.

Q. And they were were used on a ship?

A. I saw it too——

Q. One minute; you saw them use it on a ship; is that right?

A. Yes.

Q. Did you see any of them that were used without any cage on them?

A. Not without the cage.

Q. Never saw any used without the cage?

A. No, sir, not without.

Q. Did you ever see any used without the globe inside?

A. Without the globe?

Q. Yes.

A. Yes, sir.

Q. And they were all on American ships?

A. American ships.

Q. And this light here is the most improved light that you have ever seen on a ship, is it not?

A. No, sir, I have seen lights the same as that many times.

Q. But that is the best light you have seen, is it not?

A. Not the best; I see many other best as that.

Q. And when you say the one you see is the best, is the one with [fol. 98] the tape or canvas on the other side?

A. With canvas and rubber, so a man can handle it without care.

Q. Have you been working on American ships all the time?

A. Not all the time, sir.

Q. How long have you been working on American ships?

A. American ships, perhaps one or two ships in a year.

Q. When is the last time that you have worked on an American ship?
A. The last time I worked on American ship was when I just come off the Steamship "Elizabeth" of the Ball Line,—and the "Manchuria" of the American Line.
Q. What was the one before that that you worked on?
A. Before that?

The Court: American ship?
The Witness: American ship "Manchuria."

Q. When was that?
A. The month of March I left the Steamship "Manchuria."
Q. What was the one before that, the American ship?
A. Finland.
Q. That was an American ship too?
A. Yes, sir.
Q. Did you know Sanchez at all?
A. I didn't have any very close friendship with him but I saw him in this gentleman's house.
Q. In the house of Vasques?
A. In the house of Vasques.
Q. You knew Vasques?
A. I knew Vasques.
Q. How long have you known him?
A. Since 1919, I guess.
Q. Have you been boarding with him any time you were in port?
A. Yes, sir, in 1919, I boarded with him for four months.
Q. Did you ever talk this case over at all?
A. No, sir.
[fol. 99] Q. Never at all?
A. Never at all.
Q. Did you talk to Mr. Graves about this case?
A. Never at all.
Q. This is the first time you have talked about this when you came into court?
A. Yes.
Q. You are sure of that?
A. Sure.
Q. You understand everything, don't you, I am saying?
A. Yes, sir.
Q. Didn't tell anything about these lights at all?
A. Never told nothing at all; I just come to my friend's house and he——

Mr. Wagner: That is all.

BERNADO CALAZAR, 48 Sackett street, Brooklyn, called as a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct examination by Graves:

Q. How old are you?
A. 27 years.

Q. What country did you come from?
A. From Venezuela.
Q. Did you know Maximilian Sanchez?
A. No, sir.
Q. Now, did you ever work on any of the Panama Railroad Company boats?
A. No, sir.
Q. Have you worked on the Red D boats?
A. Yes.
Q. How many years have you been going to sea?
A. Since I was 8 years old; from 8 years old I am at sea, because my father took me.
Q. How many years have you been working yourself on the sea.
A. Since I was 15.

Mr. Graves: I will withdraw the witness.
Plaintiff Rests.

[fol. 100] Mr. Wagner: I move to dismiss the complaint upon the ground stated upon my original motion; will it be necessary to state that again?
The Court: No, motion denied.
Mr. Wagner: And on the further ground that this plaintiff has not shown that there was any pecuniary benefits derived by the so-called beneficiaries or heirs of the deceased or his representatives mentioned in the act, or that this deceased contributed anything toward their support. There is no reliable evidence that they had any reasonable expectancy of any pecuniary assistance from the deceased.
The Court: Motion denied.
Mr. Wagner: Exception.

CHARLES E. MONTGOMERY, a witness called on behalf of the Defendant, being duly sworn, testified as follows:

Direct examination by Mr. Wagner:

Q. Mr. Montgomery, where are you employed?
A. Panama Railroad Company.
Q. What is your business?
A. Assistant superintend*end*ing engineer.
Q. How long have you been with them?
A. About twelve years.
Q. Have you ever worked for any other steamship line?
A. No, sir.
Q. Do you remember about the 16th of August 1921 being aboard the Steamship "Gorgas" at that time?
A. Yes, sir.
[fol. 101] Q. Where was that?
A. It was at the Staten Island Shipbuilding Company.
Q. It was in drydock?

A. Yes, sir, the ship was in drydock.
Q. What were your duties on board ship at that time?
A. Well, looking after all the work and looking after the ship in general, had charge of the ship.
Q. Did you have charge of Maximiliano Sanchez?
A. Yes, sir.
Q. You were not present immediately at his death?
A. What is that?
Q. You did not see him until a few minutes after his death?
A. No, sir.
Q. How long after his death was it that you saw him?
A. Oh, I suppose, five, six or seven minutes, something like that, I don't know.
Q. Where was he at the time you saw him?
A. He was on the fireroom floor.
Q. He had been taken out of the engine room or boiler room?
A. Yes, sir.
Q. Did you see the cable there at the time?
A. Yes, sir.

Mr. Graves: I object to the word "cable."

Q. Well, I mean the exhibit. Do you know which firebox he was working on?
A. He was in the port boiler, in the forward furnace, outport furnace.
Q. Do you know what portable light was being used in there?
A. One of the ordinary portables from the ship.
Q. Was there more than one portable light in the fireroom?
A. Not in the firebox.
[fol. 102] Q. When you came down did you take charge of the portable light?
A. Yes, sir.
Q. What did you do with it?
A. I turned it over, or had it turned over to the coroner; I never let it out of my sight.
Q. Dr. Mord, the gentleman here?
A. Yes, sir.
Q. Between the time it was turned over to you and the time you turned it over to Dr. Mord, had any changes been made in the cable or the wiring part?
A. No, sir.
Q. Did you take off any tape that had been on there?
A. No, but the tape had been off.
Q. You could see that from the condition of the wiring?
A. Yes, sir.
Q. Did you examine the wires?
A. Yes.
Q. How did you examine it?
A. I felt along and connected it up and put a new bulb in.
Q. Did the lamp light?

A. The lamp lit and everything was o. k. and we felt along one end of the cord to the other.

Q. Who did that?

A. I did that, and the chief engineer, if I remember correctly.

Q. When you say "one end of the cord to the other"——

A. All over the socket.

Q. (Continuing:) Did you feel any electricity or any shock of any kind?

A. None at all.

Q. Did you examine the cord or the cable immediately at the connection?

A. Yes, sir.

Q. Did you find any break there?

A. No, sir.

Q. I ask you is this the cable that you turned over to Mr.—Dr. Mord?

A. It looks like the cable, so far as I know; it has been a long time.

Q. Did you turn over more than one cable to Dr. Mord?

A. No. sir.

Q. And the cable that you did turn over to Dr. Mord was the one that you took out of the boiler in which Mr. Sanchez was working?

[fol. 103] A. Yes, sir.

Q. And it was the only one that was in there?

A. Yes, sir.

(No cross examination.)

GEORGE MORD, recalled on behalf of the Defendant.

Direct examination by Mr. Wagner:

Q. I believe when you were on the stand before you testified that Mr. Montgomery handed you a cable?

A. He did.

Q. And that cable has been in your possession ever since?

A. It has.

Q. And has any change taken place since it has been in your possession?

A. It has not.

Q. Now, is this the cable that was handed to you by Mr. Montgomery?

A. It is.

Mr. Wagner: Now, I offer this cable in evidence.

Mr. Graves: I object to it. I want it to appear right here that I don't question that Mr. Montgomery turned this over to Dr. Mord or that this was the one that Dr. Mord had, and that Dr. Mord has produced it in the same condition as before, but it has not been identified as the cable that was in use at the time this man was in-

jured, and in fact, their main witness, who was the only one that was there, testified he removed the cable from the place and made changes in it, and that this tire tape was put on afterwards.

[fol. 104] The Court: All right, your objection is overruled, with exception.

(The article was marked Defendant's Exhibit A.)

Q. Now Doctor, I will ask you if you will remove the tape that binds the socket on the upper end of that wire, or the end of the wire that enters the socket. Leave part of the tape hanging onto the socket. I will ask you, Doctor, if you will examine the socket joint, the socket, and say whether there is any exposed part there?

Mr. Graves: I object to that as asking the Doctor's opinion on it.
The Court: Leave it there and let the jury examine it.

CHARLES E. MONTGOMERY, recalled on behalf of the Defendant, having been previously sworn, testified as follows:

Direct examination by Mr. Wagner:

Q. You have seen the lights that are customarily used aboard ships, have you not, portable lights?
A. Yes, sir.
Q. Have you seen a portable light such as Plaintiff's Exhibit 1?
A. This watertight light?
Q. Yes?
A. Yes, sir.
Q. Will you state where or what part of a ship such a light is generally used?
A. On deck for weather lights, where there is rain or stormy weather, there is watertight like that. They don't use them in the engine room. I don't know that I ever saw one used in an engine [fol. 105] room; there may have been, but it is not customary.
Q. What do you have to say as to whether that is the most improved light that is in use?
A. It would not do in the engine room or boiler room; it is too heavy for a man to carry around, where he has to carry a portable light into dark corners.
Q. What are the lights that are generally used in making repairs inside of boilers?
A. That type of lamp that you have got there, that type of socket.

The Court: You are referring to what?
The Witness: This portable light.
The Court: Defendant's Exhibit what?
Mr. Wagner: A.

Q. Can you state of your own knowledge the reason for using that portable style of light instead of the heavy deck light, as you call it?

A. Well, it would be too unhandy for the men to use to carry around and get in small corners and so on.

Q. Now, can you tell,—did you see men working on the brick wall?

A. No, sir.

Q. Didn't look in at all?

A. No, sir, I went down in the boiler room.

The Court: Never mind, you have answered it.

Cross-examination by Mr. Graves:

Q. When this Defendant's Exhibit A was handel by you to the Coroner or rather the Examiner, whatever his official name is, Dr. Mord, the Medical Examiner, this tire tape that Dr. Mord has just [fol. 106] removed was completely wrapped, wasn't it, over this socket where you see the piece of the broken bulb and over this inch or so of wire outside the socket where it appears that the outer covering of the two wires has been removed; is that so?

A. When it was handed to me?

Q. When you gave it to Dr. Mord it was in the condition that Dr. Mord produced it here in court, isn't that so?

A. Yes.

Q. And this tire tape was completely wound over these two wires, composing the end wires of the cable where they join the socket, is that right?

A. As I remember it, yes, sir.

Q. Well, you saw it here in court

A. Yes.

Q. It was in that condition just before the coroner removed the tire tape, wasn't it?

A. As far as I remember, yes, sir.

Q. I show you this socket, which apparently appears to be similar to the one that is in evidence, apparently similar, is it, except that one has a switch button and the other has not?

The Court: You are referring to Defendant's Exhibit what?

Q. Defendant's Exhibit A.

Mr. Graves: I ask to have this marked for identification.

(The article was marked Plaintiff's Exhibit 3 for identification.)

Q. Now, are these two cables similar?

A. No.

Q. One is slightly larger than the other?

A. It has one more coat over it.

[fol. 107] Q. One more coat of protection in Defendant's Exhibit A than in the one I produced?

A. Yes, that is the better cable.

Q. Which is it,—this is the new one and that is the old one, but you think the old one was the better one?

A. Yes.

Q. But you don't know why it is better now?
A. No.
Q. What is the purpose in this Plaintiff's Exhibit 3 for identification, what is the purpose of this apparently rubber thing that screw in at the butt end of the socket at the point where the cable enters the socket?

Mr Wagner: I object on the ground it is immaterial.
The Court: Objection overruled.
Mr. Wagner: Exception.

A. It is put there to keep the wire from chafing.
Q. And to prevent it from getting in this condition as shown in Defendant's Exhibit A; is that right?
A. No, it would not get in that condition; that is just to keep it from chafing.
Q. And also to keep the water from getting in?
A. No, that would not keep the water from getting in.
Q. You think it would not be of any help?
A. Not at all.
Q. If water does come down there you are going to get a shock if the water travels down and you have got your hand at the end of the socket?
A. I would not think so, no.
Q. Are you an electrical engineer?
A. No.
Q. You know something about electricity, don't you?
A. Yes.
[fol. 108] Q. Don't you know that water is a conductor of electricity?
A. But I don't think that you would get only one ground there, it would not give you any shock.
Q. Suppose that you put your hand here, your thumb on the socket and another finger on one of these other wires and your hands are wet and the water trickles down that wire to the place where the wire is bare, wouldn't you get a shock?
A. I don't think so.
Q. Can you explain why you wouldn't?
A. Because this is insulated outside.
Q. If you follow that wire down——
A. But these wires are covered with rubber.
Q. And you think if water trickles down in those wires to the place where the wire is exposed, and the wire itself exposed and here in the socket, that water acts as an extension of the wire itself, that it will carry electricity up the outside of that tape, isn't that so?
A. I don't think from my experience it has ever been done.
Q. Well, how much experience have you had?
A. Well, I have been in the business about twenty years.
Q. Then I ask you to look at this; did you ever see an appliance like that Plaintiff's Exhibit 1?
A. Oh, yes.
Q. What is the purpose of this tight rubber thing here?

A. To keep the water out.
Q. To keep the water out, yes, isn't it?
A. Yes.
Q. Do you mean to say there is any more necessity of keeping water out of Plaintiff's Exhibit 1 than there would be in keeping it out of Defendant's Exhibit A?
A. Oh, certainly; the one like this is used in inside rooms, boiler rooms and engine rooms.
[fol. 109] Q. But the principle is the same; if you are going to be around water you have got to have an appliance that would protect the wires and water from coming in where the wires are?

Mr. Wagner: I object to that question as argumentative.
The Court: Overruled.

A. Because this is out in the weather, you couldn't use this——
Q. If a man is outdoors with a light like this, you say that you will have to have that rubber cotton in there to protect the appliance from the water coming in?
A. That is, if it is raining, yes.
Q. And if it is not protected that way and does rain and the water trickles down the man is going to get a shock?
A. Not necessarily.
Q. He may?
A. He may, yes.
Q. Well, it is quite probable, isn't it?
A. No, it is not.
Q. Didn't you say a minute ago that he may?
A. Anything is possible.
Q. Do you want to change your testimony now?
A. Yes, I don't think it could happen, really.
Q. Now, what could be the difference, in your opinion, between rain coming down and water coming up a man't hand so far as practical results, what would be the difference?
A. Why, it would be the same, the water would be the same.
Q. You would get the same result?
A. You might, yes.
Q. Why do they wrap tire tape around things of that sort,—to keep the water from coming in, isn't that right?
A. Oh, no, not at all.
[fol. 110] Q. Would you say that if you had a wire like Defendant's Exhibit A, like this, that it would be advisable to wrap tire tape around the socket on those two exhibits where the——

Mr. Wagner: I object to that question.

Q. Well, we will say those two parts of those exposed wires.

The Court: Objection sustained. Please restate your question.

Q. Look at Defendant's Exhibit A. You see here next to the socket that a part of the outer covering of the cable has been removed for a distance of about an inch and the two wires remain?
A. Yes.

Q. Would you say that that would be advisable to wrap that butt end of that socket, that portion of the cable where the two wires should be, to wrap that around with tire tape?

A. Advisable for what?

Q. For the purpose of protection?

A. Protection against what?

Q. Against working around a wet place?

A. No.

Q. From electrical shock?

A. No, that would not be watertight.

Q. And your idea is that the tire tape is only to protect the appliance against wear?

A. For chafing purposes.

Q. Why don't you wrap tire tape to prevent that from chafing these other places?

A. We probably would in our boat——

Q. How much wear would it have to have before you would [fol. 111] have taken steps to repair the appliance?

A. The next time that would be back in the shop it would be done.

Q. You don't mean to say you would put a thing like that back in the shop and try to make it good?

A. Why, certainly.

Q. What would it cost to buy a new one?

A. I couldn't tell you; we are trying to save money always.

Q. How many of these things are you supposed to have on a boat like the "Gen. Gorgas"?

A. I don't know, ten or twelve.

Q. Don't you know as a matter of fact that on the day of this accident you only had two of these things left and this was one of them?

Mr. Wagner: I object to that. There is no testimony about it and I move to strike out the question.

The Court: Strike it out.

Q. You think that that boat ought to have twelve of these?

A. I didn't say that; I said it probably would have.

Q. It ought to have ten or twelve?

A. She would probably have.

Q. You are assistant engineer, aren't you?

A. Yes.

Q. How many years have you had that position?

A. About four or five years.

Q. How many of those do you generally have on the boat?

A. About eight or ten, I told you.

Q. You call that in good condition, Plaintiff's Exhibit A?

A. Yes, it is good enough to use. You can see that section that shows a little wear, that is just chafing, until you get down to the wires your outer covering is only for chafing purposes.

[fol. 112] Q. You want us to understand that it wouldn't make

any difference so far as a man's safety is concerned whether water trickles down or not?

A. I don't think so.

Q. Do you know?

A. I told you I didn't know; I don't know any better than I tell you.

Q. You have got an electrical expert with your company?

A. No, sir, I have an electrician but he is not an expert.

Q. Did you ever ask his advice about this appliance?

A. No, sir, because I know myself.

Q. Oh, you know yourself?

A. Yes, sir.

Q. Who told you that the wire was good enough?

A. Nobody told me.

Q. But you never asked the advice of an electrician?

A. No, sir.

Q. You mean to say the company has never taken an electrician into their employ for the purpose of finding out what are proper appliances for use?

Mr. Wagner: I object to that as incompentent, irrelevant and immaterial.

The Court: Sustain the objection.

Q. Have you ever in your life consulted an electrician as to what is a proper appliance?

Mr. Wagner: Same objection.

The Court: Objection sustained.

Q. As I understand it when this was turned over to the Coroner this was all wrapped with tire tape?

A. Yes, sir.

Q. You say you got down there shortly after the accident?

A. Yes.

[fol. 113] Q. Did you see Mr. Logan?

A. Yes, sir.

Q. He is chief engineer, isn't he?

A. Yes.

Q. Did he get there at all?

A. He was there, I should say a minute or two afterward.

Q. Was he there at the same time as you were?

A. Yes.

Q. All the time that you were there?

A. I could not say that. I know when we got down he was there and we talked over the case, how it happened and tested out the wires.

Q. Was the first assistant engineer there?

A. I think he was there.

Q. Is he in court?

A. No, sir.

Q. Was the second assistant there?

A. I could not tell about that.

Q. Well, you had three engineers on the boat at the time?
A. I could not say about that; I think we had three engineers,—chief and two assistants.
Q. Was Lombardo there?
A. He was there, yes.
Q. When you arrived, was the wire up in the socket and connected or was it lying on the ground or did some one have it in their hands?
A. As I remember, it was connected up to the socket.
Q. You are sure about that?
A. I said, as I remember it.
Q. And you say that you tested the wire?
A. Tested the wire, yes.
Q. Who else tested it?
A. The chief engineer, he is the only one.
Q. The two of you?
A. Yes.
Q. What sort of a test did you make?
A. As I told you before, I felt along the wire and examined it from one end to the other.
Q. When you felt of the wire, this butt end was covered up with [fol. 114] tire tape, wasn't it?
A. No, sir, I told you it was not.
Q. Do you mean to say that at the time that you tested this wire out, that the tire tape was not over the end of the wire where the socket is?
A. I said it was not.
Q. And if Chief Engineer Logan says differently, who is right?

Mr. Wagner: I object to what the chief engineer might say; he has not said anything.
The Court: Objection sustained.

Q. Mr. Logan was there when you did that, wasn't he?
A. As far as I remember, yes.
Q. And Lombardo was there?
A. As far as I remember, yes, sir.
Q. When you tested that, you knew a man had lost his life, didn't you?
A. Yes, sir.
Q. And you mean to say that without taking the wire down and examining it first that you risked your life to put your hand up the entire length of that wire knowing a man had been electrocuted?
A. Yes, sir.
Q. Without first examining the wire?
A. Yes, sir.

Redirect examination by Mr. Wagner:

Q. If any water got in here and a man had hold of the front of it, would he receive any shock?
A. Not as far as I know, he would not.

Q. Isn't it a fact that if any water had been on these wires it would cause a short-circuit and blow out the fuse?
A. If there is a heavy enough ground, yes, sir.
Q. And the fact of any water coming in there would not be the [fol. 115] cause of a man getting a shock?
A. No, sir, there was not any water there. It would have been wet when I tried it a couple of minutes afterwards.

Mr. Graves: Objected to as a conclusion.
Mr. Wagner: Perhaps you can suggest to us how a man could have got a shock from Defendant's Exhibit A.
The Court: You saw this man's body there and you saw his hands singed from an apparent electrical burning, didn't you?
The Witness: Yes.
The Court: Now look at that Defendant's exhibit and seeing what you say you did on that occasion, how do you account for his getting his hands burned on an electrical burning?

A. I don't know how he did it.

By Mr. Wagner:

Q. If any water got in there it would cause the negative and positive wires to join, causing a short-circuit?
A. Cause a short-circuit, yes.
Q. What was the work of this man Sanchez on board ship?
A. He was a coal passer.
Q. Do you know what are the wages of a coal passer today? Is it less than it was in 1921?
A. I think it is.

The Court: $45 a month and his keep?
The Witness: His subsistence, yes.

Recross-examination by Mr. Graves:

Q. In 1921 it was $90 and subsistence, isn't that so?
A. I don't remember; I am pretty sure you are wrong.
[fol. 116] Q. When was it $70?
A. I don't remember; it was $50 for coal passers.
Q. Don't you know that coal passers got as high as $95 two or three years ago?
A. Oh, there were some little jerkwater lines——
Q. Is the Shipping Board a jerkwater line? How many boats has the Panama Line?
A. Twelve.

JOSEPH A. MCMANUS, 359 West 19th street, New York City, a witness called on behalf of the Defendant, being duly sworn, testified as follows:

Direct examination by Mr. Wagner:

Mr. Wagner: I offer this light in evidence.

Mr. Graves: I object, on the ground it is immaterial; there is no similarity to the one in use.

The Court: It is excluded.

Q. You are employed by the Panama Railroad?

A. Yes, sir.

Q. What do you do?

A. I am connected with the accounting department, in connection with the payrolls.

Q. Did you have charge of the payroll of Maximiliano Sanchez in 1921?

A. Yes, sir.

Q. Do you know what his rate of wages per month was at that time—do you know generally what the wages are today of coal passers employed on United States ships?

A. $45 a month.

Q. And their subsistence?

A. And their subsistence.

[fol. 117] Cross-examination by Mr. Graves:

Q. What was the rate of wages during the War?

A. According to the United States Shipping Board schedule at the time of 1921 it was $65 a month, by the United States Shipping Board and became effective May 5, 1921, and was in effect when Maximiliano Sanchez died.

Q. Give us the previous agreement with the Shipping Board?

A. It was effective May 15th.

Q. That was after a threatened strike when they made a new agreement; I am talking about the previous agrement with firemen, when they got $90 a month.

A. I don't think a fireman ever got that.

Q. You won't swear that firemen didn't get $95 a month during the War?

A. I would almost swear to that.

Q. Will you take an oath the Shipping Board were not paying that?

A. I was not employed by the Shipping Board.

Q. You have not said anything about overtime, have you?

A. No, sir.

Q. Don't you know that in 1921 they got paid overtime on ships?

A. They got paid overtime if they worked overtime.

Q. How much did they get for overtime?

A. 60 cents an hour.

Q. And if they worked on Sundays they got overtime, didn't they?

A. 60 cents an hour.

Q. And if they worked on holidays?

A. 60 cents an hour.

Q. And if they worked in port?
A. If they worked in port overtime; they very seldom worked in port overtime.
Q. But if they did?
A. They never did to my knowledge; they were paid for the time that they were employed.
[fol. 118] Q. If they worked Sundays they got paid overtime 60 cents an hour?
A. I don't imagine so.
Q. Helping out with the cargo?
A. I couldn't say.
Q. Don't you know that some of these payrolls at the end of a two or three months' voyage, a man's overtime——
A. There never was a two or three months' voyage on the Panama Line; very seldom more than 27 days.

The deposition of Antonio Lombardo, taken November 2, 1921, on behalf of the defendant, was read into evidence by Mr. Wagner as follows:

"ANTONIO LOMBARDO, being duly sworn and examined as a witness for the Panama Railroad Company, Defendant, testified as follows:

Direct examination by Mr. Rogers:

"Q. What is your name?
"A. Antonio Lombardo.
"Q. Where do you live?
"A. 410 West 18th street.
"Q. Do you work on the ocean as a seafaring man?
"A. Yes.
"Q. Were you on the S/S 'General Gorgas' when Maximiliano Sanchez died?
"A. Yes, sure.
"Q. Were you a water tender?
"A. Yes.
"Q. Did you get a light for Sanchez?
"A. Yes.
"Q. How did you come to get this light for Sanchez?
"A. He asked me to get it.
"Q. What light was it?
"A. It was a portable light.
"Q. Was it a light used before?
"A. Yes, used between the boilers.
[fol. 119] "Q. When?
"A. I do not remember.
"Q. Did you attach the light to the electric cable coming from the shore?
"A. No, it connects with the light aboard the ship.

"Q. You did not connect the light from the shore?
"A. No, it connected only the portable light.
"Q. You attached the portable light to the electric cable coming from the shore?
"A. Yes.
"Q. After you had connected the light, what did you do?
"A. I gave it to him,—Sanchez.
"Q. What did you hear from him next?
"A. I heard nothing from him after I gave him the light and started to work.
"Q. Did some one afterwards draw the light out of the furnace?
"A. Yes, when, the other coal passer called me he said Sanchez got hurt by electricity."

Mr. Wagner: I move to strike out the latter part of that as not responsive.
The Court: Stricken out.

"Q. Did you pull the wire out?
"A. No, the coal passer pulled the wire out.
"Q. What did you do with it?
"A. I dosconnected the portable light, and took the piece of broken globe off, and I put another globe on the socket and connected it again to give a light, and then I put a piece of tape on the brass pipe so that the water don't go in, and told Sanchez here is a light again, and he should not get it wet because when it is wet you will be hurt, but Sanchez did not answer to me, and I told the other coal passer who was working alongside that I did not know whether this man is dead or not, and I told him to go inside the furnace and pull that man outside of the furnace.
[fol. 120] "Q. When you put on the new globe and attached the light, did it burn all right?
"A. Yes.
"Q. When you were fixing the globe did you receive any shock?
"A. No, sir.
"Q. Did you notice anything the matter with the wire running into the socket?
"A. No, it did not hurt me, I felt the wire."

Cross examination of the witness was read by Mr. Graves as follows:

"Cross-examination by Mr. Walzer:

"Q. Where was the S/S 'General Gorgas' at this time?
"A. In the drydock at Staten Island.
"Q. Know the name of the drydock?
"A. Staten Island Drydock, I guess.
"Q. How long were you on this ship prior to this accident?
"A. About a month and a half.
"Q. Have you made any trips?
"A. I made trips on this ship.

"Q. How many trips previous to this accident have you made on this vessel?
"A. Only once.
"Q. What was your position on this ship?
"A. Water tender.
"Q. And you were in charge of the firerooms?
"A. Yes.
"Q. Were you in charge of the firerooms on the day of this accident?
"A. Yes.
"Q. How many men did you have working under you?
"A. I had four men.
"Q. And was Maximiliano Sanchez one of these four men?
"A. Yes.
"Q. Was Sanchez and the other three men coal passers?
"A. Yes.
"Q. Was Daniel Baca a coal passer?
"A. Yes.
"Q. Was he on the vessel at that time?
"A. Yes.
"Q. Was Louis Gonzales a coal passer?
"A. Yes.
[fol. 121] "Q. Do you know the names of the four coal passers?
"A. No. The second engineer has their names.
"Q. When did these three or four coal passers join the vessel?
"A. While the ship was at Staten Island.
"Q. Do you know the date?
"A. No, you will have to ask the second assistant engineer.
"Q. How many days before Sanchez was killed did he join the vessel?
"A. About two or three days.
"Q. What work had he been doing those three days?
"A. Cleaning out the fires.
"Q. Did they remove coal from the bunkers?
"A. Yes.
"Q. Who was in charge of these four men while they did this work?
"A. The second assistant engineer gave me the orders for these coal passers.
"Q. You worked under the direction of the second assistant engineer, and you supervised the work of these four men, that were directly under your orders?
"A. Yes
"Q. You had charge of them while the vessel was in the Staten Island drydock?
"A. Yes.
"Q. On the day of this accident what orders did you receive in reference to the work from the second assistant engineer?
"A. To do the same work and to finish building bridge walls inside furnaces.
"Q. You had orders to construct brick bridge walls inside the furnace of the two large boilers,—how many?

"A. Two in each end, separated by a brick wall (indicating), one on this side, one on each floor and another in the middle, so that in each boiler there was three walls in the center between the two boilers.

"Q. How many men were building the walls at the time of this accident?

"A. Two men.

[fol. 122] "Q. One on each side of the bridge, and each of the men building a separate wall?

"A. Yes.

"Q. Could the men see each other while they were building this bridge?

"A. Yes, you can see from one fire box into the other fire box.

"Q. The two men who were constructing this bridge were facing each other while at work?

"A. Yes.

"Q. What was Sanchez doing?

"A. He was building up the wall; he was in one firebox constructing the bridge.

"Q. Who was in the other?

"A. Gonzales.

"Q. What were the other two men doing?

"A. The other two men were mixing cement and brick, and passing brick to the fellows working inside.

"Q. What boiler were they working on at the time of this accident?

"A. On the port side.

"Q. What time was it in the morning that they started their work?

"A. They started in at 8 o'clock in the morning.

"Q. What day of the month was it?

"A. I don't know.

"Q. Was it in August of this year?

"A. Yes, I think it was August.

"Q. Was it the 26th of August of this year?

"A. Yes.

"Q. Was the dynamo aboard this vessel operating at the time of this accident?

"A. I do not know.

"—. Were there any lights on the ship, and where did the power come from?

"A. On shore.

"Q. They had a cable fastened from shore to the vessel.

"A. Yes.

"Q. And that furnished all the power on board the vessel?

"A. Yes.

[fol. 123] "Q. The boilers were not going so they would not need power on the ship?

"A. Yes.

"Q. How many connections for lights were there in the firerooms where these men were working?

"A. Four.

"Q. How many sockets were there?
"A. Four sockets.
"Q. Were these two outlets or sockets in the firerooms, one on each side?
"A. Yes.
"Q. When you instructed these men to build the bridges in the firebox that morning did they have any light put in the fire box?
"A. No.
"Q. Was it dark in there before you gave them a light?
"A. Sure, inside it was dark, because they had no light?
"Q. Did they ask for a light?
"A. Yes, each asked me for a light.
"Q. What did you do?
"A. I told him I would get a portable light.
"Q. Where did you get it?
"A. In the storeroom.
"Q. What kind of a portable light did you get,—was it a long one with a socket on each end, or no socket on one end and screw socket on the other?
"A. Yes.
"Q. How long was this wire cable?
"A. About 15 or 20 feet.
"Q. What color was it?
"A. Black.
"Q. Did the outer covering show black like you see ordinary electric wires?
"A. Yes, black.
"Q. Was it cloth covered?
"A. Yes.
"Q. Could you see the wire itself, or any part of this cable?
"A. No, I do not think so. I do not remember.
"Q. Did you examine it?
"A. Yes.
"Q. The wire being out of the cloth you put your hand on it and hurt yourself?
"A. No.
[fol. 124] "Q. This wire cable belonged to the ship?
"A. Yes.
"Q. It was one of the appliances of the vessel?
"A. Yes.
"Q. You did not ask any officer of the ship permission to take it?
"A. Yes.
"Q. It was customary to take one of those portable lights whenever you need it for any part of the vessel?
"A. Yes.
"Q. You were in charge of the fireroom so that you thought it perfectly proper to take that portable light and use it?
"A. Yes.
"Q. Now, what you did with this portable light when they asked for it, you put it in the socket, attached one end of the socket and the other end you gave to Sanchez?
"A. Yes.

"Q. Did the socket have a bulb in it?
"A. Yes.
"Q. Did you see what Sanchez did with it?
"A. No.
"Q. Was Sanchez in the firebox when you gave him the light?
"A. Yes.
"Q. You handed the tube to him through the fire box door?
"A. Yes.
"Q. You gave him the light on the bridge where he was working?
"A. Yes.
"Q. Then what did you do?
"A. I went on the other side to see what the other fellow was doing.
"Q. Did you give him a portable light too?
"A. No.
"Q. What kind of a light did he have?
"A. He had an oil lamp.
"Q. Why did you not give him a portable light?
"A. There was no more portable lights on the ship, only two used in the fire room.
"Q. Where was the other portable light?
"A. Second assistant engineer was using it.
[fol. 125] "Q. Where was the second assistant engineer at that time?
"A. I do not know, I guess in the store room.
"Q. You did not have another portable light to give to the man who was working on the opposite firebox?
"A. No.
"Q. This was the only portable light available at the time Sanchez asked for a light?
"A. Yes.
"Q. You wanted to see what the other man was doing,—what did you do then?
"A. I took a walk to the other boiler.
"Q. How long did you stay in the fireroom altogether?
"A. I was there 8 o'clock in the morning until Sanchez got killed.
"Q. What was the first that you heard of this accident?
"A. I didn't hear anything.
"Q. You were in the opposite fireroom?
"A. Yes.
"Q. While you were in the opposite firebox, could you hear what was going on in the other fireroom?
"A. I heard nothing.
"Q. Could you see the men working at the other end?
"A. No.
"Q. From your position in the other fireroom you could not see the fireroom where Sanchez was working?
"A. No, I could not see.
"Q. The first you heard of the accident was when a coal passer ran to you and called you?
"A. Yes.

"Q. What did he say to you?
"A. He told me Sanchez got hurt from the electricity.
"Q. What did you do?
"A. I go to the other side of the boiler room.
"Q. What time of the day was this about?
"A. About 9 or 10 o'clock.
"Q. About two hours after they started to work?
"A. Yes.
[fol. 126] "Q. Where was the portable light when you came running back from the other firebox?
"A. Right in the fireroom.
"Q. Were there any sparks coming from the light at all?
"A. No, I do not see any.
"Q. Do you know what sparks are?
"A. Yes.
"Q. Was the bulb broken?
"A. Yes.
"Q. Did you pick up the portable light?
"A. Yes, I first disconnected it from the wall and then took off the broken bulb.
"Q. Did you touch this wire while it was still connected to the outlet on the wall?
"A. No.
"Q. The only time you touched it was when you disconnected it from the outlet?
"A. Yes.
"Q. Then what did you do?
"A. I took out the globe and put in another.
"Q. Then what did you do?
"A. Connected it again.
"Q. You mentioned something about tape,—what part of the cable did you put the tape on the brass pipe?
"A. The brass socket to which the globe was fastened.
"Q. Did you put any tape on the wire near that socket?
"A. No.
"Q. Are you sure of that?
"A. Yes, I put the tape on to the cable at the place where the wire went into the socket.
"Q. How much of cable did you cover with tape (indicating)?
"A. I do not remember.
"Q. Two or three inches of the cable and all the entire socket?
"A. Yes.
"Q. At this point where the cable went into the socket can you see the wires?
"A. No.
"Q. Did you look to see the wires?
"A. No.
"Q. Why did you cover that particular part?
"A. I put it in because it would keep the water from going through.
[fol. 127] "Q. What made you think of water going in there?
"A. Because I got hurt myself lots of times by that same thing.

"Q. By that same cable?
"A. No, a different cable.
"Q. On the same ship?
"A. No, a different ship.
"Q. What made you suppose that Sanchez got hurt by that cable at that particular point where you put the tape on?
"A. I put the tape to save water from going in. I did not want the water to *do* in.
"Q. In any event you covered the socket with tape, about two or three inches of the cable all the way down?
"A. Yes.
"Q. And then what did you do?
"A. I gave it to Sanchez.
"Q. You looked in the firebox and told Sanchez to look out and not get the cable wet because you will hurt yourself?
"A. Yes.
"Q. When you put the light in the firebox where was Sanchez?
"A. Sanchez did not answer. I told the other fellow who worked on the other side I do not know whether this man is dead or not."

Mr. Wagner: I move to strike out what he told someone else.
The Court: Yes, strike out what he told somebody else.

"Q. When you spoke to Sanchez and he did not answer you, did you see Sanchez then?
"A. I saw him right on the bottom of the furnace.
"Q. In what position was he in?
"A. (Indicating.) Crouching position.
[fol. 128] "Q. Who was in the firebox besides Sanchez?
"A. There were bricks there on the floor of the furnace.
"Q. On the floor?
"A. Yes.
"Q. Was there any cement there?
"A. Yes.
"Q. Where was the cement?
"A. In the bucket.
"Q. Was it thick and mixed?
"A. Yes.
"Q. Was there any water in the room?
"A. Yes, bucket full of water.
"Q. What did Sanchez use the water for?
"A. To wet the place where they put the cement on.
"Q. Do you know where Sanchez had the light hanging; in what part of the firebox?
"A. No.
"Q. You looked in and saw Sanchez all crouched on the bottom of the floor; what did you then do?
"A. I told the other fellow to go in and lift him by the head and I pulled him by the feet and we took him out of the box. I moved him on the floor and took examination of him by heart and everything, and I said to the other fellow he was dead.

"Q. What did the other fellow do?
"A. I told him to get the second assistant engineer.
"Q. Who else came down besides the second assistant engineer?
"A. The chief, the captain.
"Q. Did you get a doctor?
"A. Yes.
"Q. How soon after you discovered Sanchez was dead did you call a doctor?
"A. About half an hour or an hour, I guess.
"Q. Did the doctor examine him?
"A. Yes.
"Q. Did you examine him?
"A. Yes, I examined him first.
"Q. Did you notice anything about Sanchez' hands?
"A. No.
"Q. Did the doctor examine his hands?
"A. I do not know.
[fol. 129] "Q. What was the condition of Sanchez' hands when you pulled him out of the furnace?
"A. All swollen.
"Q. Did you look at Sanchez' hands any time after you pulled him out of the furnace?
"A. No.
"Q. You didn't notice anything?
"A. No.
"Q. Did you see the doctor examine his hands?
"A. I do not know. I saw the doctor examine his heart and said he was dead.
"Q. Did you see the doctor examine his hands and make the remark 'being all blue and burnt'?
"A. No.
"Q. You did not hear him say that?
"A. No.
"Q. What did you do with Sanchez after that?
"A. Kept him there about an hour and then we took him on shore.
"Q. Who finished the work?
"A. The coal passers.
"Q. The same three men?
"A. Yes.
"Q. Did they continue to use that socket and portable light?
"A. No, he took it ashore.
"Q. Who took the portable light ashore?
"A. Mr. Mo[illegible]ery.
"Q. Who is Mr. Montgomery?
"A. One employed in the Panama Line.
"Q. Where,—Staten Island?
"A. Yes.
"Q. What is his position?
"A. I don't know, I think he is engineer or something of that sort.

"Q. Did you say anything to Mr. Montgomery about this socket and light and did he examine the socket and light?
"A. I do not know.
"Q. Did anybody examine the portable light?
"A. No.
"Q. Did you tell him Sanchez was killed by the portable light?
"A. Yes.
"Q. You told him so?
"A. Sure.
[fol. 130] "Q. What did he do when you told him that?
"A. He took the portable light.
"Q. Did not examine it in your presence, did he?
"A. No.
"Q. Did you see him take the tape off of that light?
"A. No.
"Q. Did anybody in the fire room take the tape off?
"A. No, sir."

Mr. Wagner: I move to strike out the question and answer on the ground the witness said he didn't know whether anyone did.
The Court: Motion denied.
Mr. Wagner: Exception.

"Q. Were there any police there?
"A. Yes.
"Q. Did he take the tape off?
"A. I don't know.
"Q. Did he examine the portable light?
"A. No.
"Q. You are positive of that?
"A. Yes.
"Q. Were you present while all of this was going on?
"A. Yes.
"Q. How long was Mr. Montgomery in the fireroom?
"A. About ten minutes.
"Q. Did any of the officers remove the tape from the portable light?
"A. No.
"Q. From the time you put the tape on to the time that portable light was taken ashore was that tape removed?
"A. Yes, they took it off.
"Q Who took the tape off?
"A. No, they did not know of the tape, they leave everything the way she are."

Mr. Wagner: I move to strike out the first part.
The Court: Strike out the first part.
Mr. Wagner: I move to strike out at this time all reference to his having been hurt by asy portable light on this or any other ship; [fol. 131] he states that it was not this portable light.
The Court: Strike it out. The evidence will be stricken out and the jury will disregard it.
Mr. Graves: I take an exception.

"Q. Did they get you a new portable light?
"A. No.
"Q. How did you finish the work?
"A. With oil lamp.
"Q. Where did you get the oil lamps?
"A. From the store room.
"Q. Are you still employed by the Panama Line?
"A. Yes.
"Q. On what ship?
"A. Panama, on the same vessel and different ships.
"Q. Are you employed by the Panama Line on the S/S 'George Gorgas' on this same ship Sanchez was killed and in what capacity?
"A. Boiler water tender.
"Q. Where is the vessel now?
"A. I guess in Hoboken Harbor.
"Q. Are the same officers on this ship now as when Sanchez was killed?
"A. Yes.
"Q. What is the name of the Second Assistant Engineer?
"A. I don't know.
"Q. Is he on the ship?
"A. Yes.
"Q. What is the name of the First Assistant Engineer?
"A. H. V. Lohsee (taking name from his employment card). He is a new man.
"Q. Was Lohse the first assistant engineer on the S/S 'General Gorgas' at the time Sanchez was killed?
"A. No.
"Q. Who was?
"A. A fellow living in Philadelphia.
[fol. 132] "Q. Who was the chief engineer on the vessel?
"A. I don't know the officers' names, call them 'Chief,' etc., or 'first,' 'second,' etc.
"Q. Was the chief engineer on the 'Gorgas' the same chief engineer as when Sanchez was killed, and is he on the ship now?
"A. Yes.
"Q. Is Mr. Montgomery still employed by the Panama Line?
"A. Yes.
"Q. Do you know what he did with that portable light?
"A. No.
"Q. You said you were hurt by a portable light before, were you ever hurt by this same portable light?
"A. No.
"Q. Were you ever hurt by any portable light on this ship?
"A. Yes.
"Q. Were you ever hurt by that portable light which was the same as this portable light that was used on the day of the accident?
"A. No.
"Q. Are you an electrician?
"A. I know a little, not much.
"Q. Did you ever study electricity?
"A. Yes.

"Q. Where?
"A. On the steamer.
"Q. All you know about electricity is what you learned from experience?
"A. Yes.
"Q. Where do you live?
"A. 410 West 18th street.
"Q. New York?
"A. Yes.
"Q. Are you on shore leave now?
"A. Yes.
"Q. Are you going back to the 'General Gorgas'?
"A. Yes.
"Q. Do you expect to make the next trip on her?
"A. Yes."

(Whereupon, at 4:00 o'clock p. m. an adjournment was taken till 10:00 o'clock a. m., April 26, 1923.)

[fol. 133] Brooklyn, N. Y., 10:00 o'clock a. m.

Trial Resumed

Mr. Graves: I would like to recall Mr. Montgomery for recross examination for just a couple of questions.

CHARLES E. MONTGOMERY, recalled, testified further as follows:

Recross-examination by Mr. Graves:

Q. Mr. Montgomery, I believe you stated yesterday that this wire was up in the socket at the time you arrived in the fireroom, is that right?
A. As far as I remember, yes.
Q. It was attached?
A. Yes, as far as I remember.
Q. Was there any globe in the other end?
A. Yes.
Q. And you say that you removed the tire tape from the socket end,—or the globe end?
A. I don't know who removed it.
Q. But it was removed in your presence?
A. As far as I remember.
Q. You were there to make a test, weren't you, to determine the cause of this accident, is that right?
A. Well, I went there to see if there was anything wrong with the wire.
Q. You wanted to determine the cause of the accident?
A. Yes.

Q. Was it your understanding that this accident occurred while [fol. 134] the end of this cable to which the lamp is attached was uncovered with tire tape or was it covered?

Mr. Wagner: I object to the question as improper; it calls for a conclusion on the part of the witness, and it is argumentative.
The Court: Objection sustained as to what his understanding is.

Q. At any rate, you removed the tape binding to make your test?

Mr. Wagner: I object to that question.

Q. Well, the tape was removed for your test?

The Court: Objection sustained.

A. Yes.
Q. Then why did you put the tape back on again before you turned it over to the coroner?

Mr. Wagner: I object to that as improper and calling for a conclusion.
The Court: Objection overruled.

A. Because I wanted to put it the way I found it.
Q. Why didn't you make a test with the tape on then, if that is the way the accident happened?

Mr. Wagner: I object to that; it does not coincide with the way the accident happened.
The Court: Objection sustained.

Q. You wanted to turn over the appliance to the coroner in the condition it was in at the time when the accident happened, didn't you?
A. I wanted to turn it over as I found it.
[fol. 135] Q. Well, the tape had been taken off, hadn't it?
A. In my presence, yes.
Q. Did you tell the coroner that the tape had been removed?
A. As far as I remember——

Mr. Wagner: I object on the ground it is immaterial,—what he told the coroner.
The Court: Overruled.

Q. Did you?
A. As far as I remember, we did.
Q. And yet you put the tape back on and he left it on?
A. He left it on.
Q. Did you hear him say in court yesterday that the tape had never been removed?
A. Since he had it?
Q. Since he had it?
A. Yes.

The deposition of William Logan, taken on behalf of the Defendant, was read by Mr. Wagner as follows:

"WILLIAM LOGAN, being duly sworn and examined as a witness for the Panama Railroad Company, Defendant, testified as follows:

Direct examination by Mr. Rogers:

Q. Where were you employed on or about the 26th of August, 1921?
A. On the Steamship 'Gorgas'.
Q. In what capacity?
A. Chief engineer.
Q. How long have you been a chief engineer on that ship?
A. Since the 2d of July, 1921.
Q. Where are you employed at the present time?
A. On the same ship.
[fol. 136] Q. On the 'Gorgas' and in the same capacity?
A. Yes.
Q. Before that where were you employed?
A. With Mitchell Co., 24th Street, machinists.
Q. Do you remember the death of Maximiliano Sanchez, coal passer?
A. Yes, sir.
Q. Where was the ship located?
A. In drydock at the Staten Island Shipbuilding Company.
Q. In Staten Island?
A. Yes, sir.
Q. What do you know about that death?
A. The man was employed as coal passer in the back connections of the port boiler at the time of the accident, building bridge walls. That is what he was engaged in doing at the time of the accident.
Q. Did you see the accident yourself?
A. No, I was down in the drydock."

Mr. Graves: Is that all you are going to read?
Mr. Wagner: I object to comments made by Counsel as to how I am going to try my case.
The Court: The jury will be instructed to disregard all remarks. Of course he has a right to ask if that is all you are going to read if there are more questions there.
Mr. Graves: I will read the rest of it myself then.

"Q. You were down in the drydock and came up afterwards?
"A. Yes, sir, I think it was the first assistant that called me. He told me an accident happened.
"Q. Where did the electricity come from that was being used in the lamps?
"A. From the Staten Island Shipbuilding Company.
"Q. How was it brought abroad?
"A. By wire from their plant.

[fol. 137] "Q. Did you examine the cable to which the lamps were attached, after the accident?

"A. After the accident, yes.

"Q. Was this man working in the boiler room with a portable light, the cable to which the lights were attached connected with the shore?

"Mr. Graves: I object to this at the present time, as the witness was on shore at the time referred to in the question.

"The Witness: I was down on the dock.

"Q. What knowledge have you that the lamp he was working, which you saw, was the same lamp previously installed?

"Mr. Graves: I object to the form of question, as calling for a conclusion, and as incompetent, immaterial and irrelevant.

"The Witness: Why was it pointed out to me?

"Q. Who pointed it out to you?

"A. Mr. Lombardo, who was there on the job all the time.

"Mr. Graves: I move to strike this out as being a conclusion and clearly based on hearsay.

"Q. Was there any light around the boiler at that time?

"Mr. Graves: I object to this question as the witness has testified that he was on the dock at the time referred to in the question.

"The Witness: Not in that particular part.

"Mr. Graves: I move to strike out the answer, as the part is not [fol. 138] definitely fixed, also as the witness again refers to the place where the decedent was, although the witness was on the dock at the time and has no personal knowledge and his answer can only be based upon hearsay.

"Q. State what steps you took, and what you found when you came up to the place where Sanchez was prostrated?

"A. Sanchez had been taken out of the back connection and was lying on the floor of the forecastle.

"Mr. Graves: I move to strike this out on the ground that the same is also based upon the assumption of something that took place during the witness' absence.

"Q. Did you find when you went up there in the neighborhood of Sanchez any portable light in the cable attached to the electric light on the shore?

"A. Yes, there was a light there.

"Q. Where was it?

"A. Lombardo had it in his hand at that time.

"Q. How far was he away from Sanchez?

"A. At the time of the accident, I cannot say.

"Q. At the time you saw him?

"A. He was standing alongside of him at that time.

"Q. Where did that light run to, the cable, I mean?
"A. It ran and joined the main cable that was coming from the dock.
"Q. Was it still attached to the main cable?
"A. I cannot tell you now whether it was at that time.
"Q. Was it loose from the cable or away from the lamp altogether?

"Mr. Graves: I object to the question on the ground that the wit-
[fol. 139] ness has already answered and stated he could not say, and as being also leading and suggestive.
"The Witness: If I remember right, they were put on and we tried it out every way without getting shock from it.

"Q. You put the wire back and tried it out every way?
"A. Yes, sir.
"Q. What other way did you try it out?
"A. By feeling it.

"Mr. Graves: I move to strike this out, as the witness has not identified the wire referred to as being the wire that caused decedent's death.

"Q. Give more details of the test that you made of this wire after you re-attached it to the connection of the electric wire leading to the shore?

"Mr. Graves: I object to the question on the ground that the wire referred to in the question has not been identified as being the same wires as is alleged to have caused decedent's death.
"The witness: We fixed it up in its place, and went over it all and tried it out with the hand, and I got no shock from it.

"Q. What part of it?
"A. Every part of the light from one end to the other—every part of it.
"Q. Did you put your hand upon the flange connections?
"A. That would help break the connections.
"Q. The cable thread?
"A. Yes, the light was broken after the accident.
[fol. 140] "Q. What test did you make?
"A. I put a new lamp in.

"Mr. Graves: In this connection, I wish to make a general objection to these questions and answers on the ground that the witness has not identified the appliances which he claims caused the death.

"Q. As I understand, you attached the wire to the electric supply, and then put on a new lamp?
"A. That was the only alteration, as far as I know.
"Q. To see whether it was working?
"A. Yes.
"Q. The electric light worked?
"A. It did, and it lit and I got no shock whatever. I believe Mr. Montgomery——

"Mr. Graves: I move to strike this out, as the belief of the witness being hearsay and refers to what somebody else did in his absence.

"The Witness: That particular lamp I tried out myself, and everything was all right.

"Mr. Graves: I object to the answer, as the witness has not testified that he knows of identifying the appliance that he has been talking about and which is being alleged to have caused the decedent's death, and the testimony is the statement of somebody else.

"Q. Did this accident occur in the engine room or boiler room?

"A. Boiler room.

"Q. How large was this boiler room?

"A. About thirty-six feet long and thirty feet wide.

"Q. When you got there and examined a certain light connected [fol. 141] with the flexible cable, how many such lights and cable were in that room at the time?

"A. About two, I think.

"Q. Where were the other lights situated?

"A. In the aft stokehole.

"Q. Where was that light hanging from?

"A. From the same socket.

"Q. Where was the other end of the light—the one that carried the portable lamp—I am talking about the second lamp?

"A. At the same place.

"Q. It was attached to the electric supply socket,—where did the other end run to?

"A. To the aft stokehole.

"Q. Was that located in the place when you got there?

"A. Yes, it was in the aft stokehole.

"Q. You saw that light, and when you saw another light held by Lombardo, alongside where the accident happened?

"A. Yes.

"Q. Outside of those two lights, what other lights were there of a portable character?

"A. I do not remember it was a long time ago. I made a statement at the time. I cannot remember, if I cannot see the statement, it happened so long ago.

Mr. Rogers: Here is your statement, do you wish to look at it.

Mr. Graves: I have no objection to him refreshing his recollection from the statement, providing he states he has no independent recollection without the statement. Can I cross examine him?

Mr. Rogers: Yes.

Cross-examination by Mr. Graves:

"Q. You told us everything you could remember without reading your statement?

[fol. 142] "A. I remember some things that I have told about that are in the statement.

"Q. You were examined at the present time about the number of

portable lights that you remembered were in the boiler room at the time, and you spoke of two?

"A. At least two, anyway.

"Q. How many lights were running out of the socket nearest the place where this man was injured?

"A. Two at least from that place—at least two.

"Q. Could there have been three?

"A. Very easily.

"Q. You do not remember whether there was three or not?

"A. Yes, I believe there was more than two.

"Q. Describe where those various lights from this socket run?

"A. One runs to the aft stokehole, and the other to the back connections.

"Q. Where did the third run, if there was three?

"A. I am not sure that there were three—there might have been four and there might have been five. I know there was two.

Redirect examination by Mr. Rogers:

Q. Which light did you make an examination of after you came up to where the man was lying?

A. The one pointed out to me as having caused the accident.

"Q. As pointed out to you by the man named Lombardo?

"A. Yes, sir. He was the boss of the men that were working in the stokehole.

"Q. What condition did you find the light, and in what condition did you find the cable attached to the light?

"Mr. Graves: I still object to this line of questions as the witness [fol. 143] had not identified the light referred to in the question was the one that caused decedent's death.

"The Witness: Good condition.

"Mr. Graves: I move to strike this answer out as it is a conclusion.

"Q. Describe how it was wrapped and how it was insulated?

"A. It was frayed in some places but the outside was good.

"Q. How was it insulated?

"A. Insulated by rubber next to the wire itself, and then I believe was some sort of cotton around that.

"Q. Cotton over the rubber?

"A. Then rubber again, I believe, and outside the same thing like a double insulator; two wires running through the one cable, each insulated and bound together, with general insulation around the two. Then you have an insulation covering outside.

"Q. Where was it frayed that you speak of?

"A. The outside covering.

"Q. That was the cotton covering?

"A. Yes.

"Q. Did you examine the rubber carefully and see whether the insulation was all right?

"A. Yes.

"Q. Was it so?

"A. Yes. I put my finger over every part of it. I got no shock from it.

"Q. You ran along the cable with your fingers after it had been attached to the socket and was burning?

"A. Yes, the light was burning with a new lamp in it.

"Q. You ran your fingers over it when the electricity was flowing through the wire?

"A. Yes, sir, I got no shock from it at all.

"Q. Did you cover the whole reach of the wire?

"A. Yes, right from the socket to the light. You understand this man was dealing in wet material, and he was sweating—that was different from me,—my hands were dry.

[fol. 144] "Q. If the insulation of a wire is good, does it make any difference whether your hands are wet or dry?

"A. It should not, no.

"Q. How long was the cable to which the lamp was attached?

"A. I am sure it must have been 15 or 18 feet long, at least.

"Q. How far was the entrance to the boiler from the bracket connections?

"A. Say twenty feet, roughly, twenty feet.

"Q. What was the distance from the inside of the boiler where Sanchez was working to the socket or cable connection?

"Mr. Graves: I object to the question upon the ground that it is too indefinite as to where he was working. I have no objection to limiting the question to the nearest or farthest point.

"Mr. Rogers: I am asking him the distance from the inside end of the boiler alongside which Sanchez was lying and the socket on the cable connection.

"The Witness: It was about seven feet in front of the boiler where he was hurt.

"Q. About seven feet?

"A. Inside the boiler.

"Q. And how far was the end of the boiler from the cable connection to the socket?

"A. About five feet, perhaps six feet.

Recross-examination by Mr. Graves:

"Q. Mr. Logan, you say you were working in what capacity on board the 'Gorgas' at that time?

"A. Chief engineer.

"Q. You say that you first went to work for the Panama Railroad Company when?

"A. The 2d of July, 1921.

[fol. 145] "Q. Had you ever worked at sea before that date?

"A. Since 1906.

"Q. With what companies?

"A. White Star Line, Kerr Steamship Company.

"Q. When did you stop going to sea prior to the time that you took this position with the Panama Railroad Company, just approximately?

"A. About the end of August, the year previous.
"Q. So that you had been doing work on shore for a year?
"A. Not on shore, some dry dock work on vessels alongside.
"Q. You were doing shipping work, repair work on shore for vessels in dry dock?
"A. Yes, sir.
"Q. Had you prior to the date of this accident had any particular experience with electrical appliances?
"A. Only fixing lights aboard ship.
"Q. Did you specialize in electricity?
"A. I had to specialize a little in order to get my license.
"Q. Just enough to pass examination?
"A. Yes.
"Q. Just enough to get by?
"A. Yes.
"Q. At the time of this accident you were an electrical expert, were you?
"A. No, I am not an electrical expert.
"Q. You did know, however, in a general way about electricity, electrical wiring and apparatus?
"A. Yes, sir.
"Q. Did you know that electrical wires had to be insulated?
"A. Certainly.
"Q. And did you know if electrical wires were not insulated, and a man coming in contact with uninsulated wires that he would receive an electric shock and would be injured?
"A. Not necessarily injured.
"Q. You do not believe that?
"A. Not necessarily, I do not say that.
[fol. 146] "Q. On the date of this accident, were any of the ship's dynamos working?
"A. No, sir, the seamen were all off the ship.
"Q. The dynamos were not working?
"A. No, sir.
"Q. Ordinarily when the vessel is in commission, the electricity is furnished, is it not, by the vessel's own dynamos?
"A. Yes.
"Q. But this vessel was being repaired?
"A. Yes, sir.
"Q At the time of this accident the electricity was being furnished from shore?
"A. Yes.
"Q. You retained certain seamen on board during that period, did you?
"A. Yes, sir.
"Q. One of them was the decedent, Maximiliano Sanchez, is that right?
"A. Yes.
"Q. How many seamen did you have on board on the date of this accident?
"A. Six connected with the fireroom department.

"Q. They were kept on board as seamen?
"A. As seamen.
"Q. That is, you always keep part of the crew on board when the vessel is being overhauled or repaired?
"A. Yes.
"Q. Is there any part of the work done by people from on shore, the heavy work?
"A. Yes.
"Q. Light work, the same kind of work they do at sea, is done by the ship's crew, and at the ship's own expense?
"A. Yes.
"Q. The work that is not let out is ordinarily seamen's work?
"A. Yes.
"Q. Doing general overhauling and light work such as they do at sea?
"A. Yes.
"Q. And looking after the ship's property, is that right?
"A. Yes.
"Q. How did the electricity come from on shore, did it come on [fol. 147] one wire, or several?
"A. One big wire.
"Q. Main feed wire?
"A. Yes.
"Q. Did that main feed wire supply all the lights for the ship?
"A. Yes.
"Q. For the entire ship during the time that she was at drydock?
"A. It did not go through the passengers' quarters, and was only where required for carrying on the work.
"Q. Did this wire also furnish the lights for the seamen's quarters, officers' rooms and forecastle?
"A. No, they did not attach up to them, only where we could — the portable.
"Q. They were using lamps in other parts of the ship?
"A. Only where work had actually been carried out. They did not go into a switchboard. Sometimes in a switchboard you can just put in switches wherever you want to. In this particular instance they only went down to the engineroom and stokehole.
"Q. Do you know what the voltage was in that main feed wire?
"A. I did not see a flange. I was told it was 220 volts."

Mr. Wagner: I move to strike out the statement "I was told." etc
The Court: Strike it out.

"Q. Who was the other officer on the boat the day of this accident?
"A. First assistant.
"Q. Do you remember his name?
"A. Irwin.
"Q. Do you know where is is now?
"A. No, he left the ship long ago.
"Q. Who else was aboard then?
"A. Lombardo, he was aboard.
"Q. What other officers?

"A. The first assistant engineer.

[fol. 148] "Q. Just you and the first assistant?

"A. Yes.

"Q. Were aboard at the time of the accident?

"A. I was not.

"Q. You were the only two engineers there at the time no others employed?

"A. I do not think so at the time.

"Q. You are not sure, are you?

"A. I know they were employed, that is all.

"Q. You do not recall definitely any other engineers were employed at the time?

"A. I believe the 3rd assistant was there at the time—put that down.

"Q. So there were three officers in the engine room?

"A. Demott was his name, that is the third officer.

"Q. Then you had one watertender, Lombardo, and four coal passers, is that right?

"A. Yes, I had four coal passers.

"Q. Anybody else in the engine room berth employed at that time, or fireroom berth?

"A. I believe we had a man called Romeris. He is not on the ship now.

"Q. What was his job?

"A. He was an oiler.

"Q. You say Lombardo is still on the vessel, and where is the vessel?

"A. At Pier 67, North River.

"Q. When will the vessel sail?

"A. Tomorrow at three o'clock.

"Q. Are you sailing on the vessel?

"A. Yes.

"Q. You say Lombardo was present when you made these tests?

"A. Yes.

"Q. And he is the man who pointed out the apparatus that you tested?

"A. Yes.

"Q. You are sailing tomorrow for Panama?

"A. Colon, District of Panama.

"Q. When will you return?

"A. About the 9th of May, I think, and sail again on the 15th.

[fol. 149] "Q. When did you last see Lombardo?

"A. About three hours ago.

"Q. On board the ship?

"A. Yes.

"Q. Had you ever talked over this case with Lombardo?

"A. When the man died we talked—everyone on the ship was talking about it.

"Q. When did you have that conversation?

"A. When the accident happened.

"Q. You never talked with Lombardo since about this accident?

"A. May have had one or two conversations, that was all.
"Q. When did you first talk about this case to anybody else?
"A. With anybody else?
"Q. You talked to Mr. Rogers about the case?
"A. I made that statement.
"Q. You made a statement in writing?
"A. Yes.
"Q. When did you make that statement?
"A. A day or two after the accident.
"Q. Did you tell Mr. Rogers that Lombardo was present when you made these tests?
"A. I do not know whether he asked me, I am not sure.
"Q. You do not recall whether you told Mr. Rogers that Lombardo was present at the time that you made the tests that you testified to this afternoon?
"A. I do not know. I do not remember. I am sure I put a lot in that statement, I believe——
"Q. Did you ever tell him Lombardo was there—as a matter of fact, you do not remember very much what you wrote in your statement?
"A. I have not read that statement yet. He has not given me the statement yet.
"Q. You signed that statement—yes?
"A. It is true what I signed.
"Q. You signed that statement?
"A. Yes.
[fol. 150] "Q. You read it over before you signed?
"A. Yes.
"Q. On your direct examination you testified "If I remember right, they were put back and worked all right", did you so testify?
"A. Yes.
"Q. Is there any doubt in your mind as to what took place,—as to what occurred?
"A. When?
"Q. At the time referred to in that testimony I have just quoted?
"A. Doubt in my mind?
"Q. I mean, is your recollection hazy on the point?
"A. About the test,—no.
"Q. Then why did you qualify your answer by saying "if I remember right"?
"A. That light was tested.

"Mr. Graves: I move to strike the answer out as it is non-responsive.
"The Witness: I thought it over a bit more and it came back to me.

"Q. At the time you testified and used the words "if I remember right", your recollection was not particularly clear on that point, was it?
"A. Now that I think over it, it is clear enough now.

"Q. At the time you testified on this direct examination, it was not clear in your mind?

"A. That was only a few minutes ago.

"Q. At that time, it was not clear in your mind?

"A. Yes, it was.

"Q. I want to be fair with you, as I understand it, you say now that when you testified in answer to Mr. Rogers you said that your recollection was not clear, but now that I am questioning you, you recall more definitely, is that so?

"A. On that particular point.

"Q. As a matter of fact, you just stated, did you not, that this thing happened some time ago?

"A. Yes.

[fol. 151] "Q. And it is hard for you to recollect anything that occurred, is that so?

"A. I can't, on some of the small details.

"Q. Do you consider your testing out this apparatus an important thing in your testimony?

"A. Yes.

"Q. That is the main part of your testimony?

"A. I tested the light out.

"Q. It is the main feature of your testimony, according to your own belief?

"A. I tried out the light.

"Q. In your mind was the testing out of that light an important part of your testimony today?

"A. From my point of view.

"Q. Is that an important matter in your testimony, or do you consider it a minor feature?

"A. I do not.

"Q. That it is the main thing?

"A. I do not know whether it is.

"Q. And yet you say when you testified in reply to Mr. Rogers on direct examination that you were uncertain as to what you did, but on cross examination by me you state you have a more definite recollection?

"A. You put it in a different way. Your question is in a different way.

"Q. Now, tell us what you did then?

"A. The lamp was tested out.

"Mr. Graves: I move to strike the *an-* answer out as it is nonresponsive.

"Q. The point I am getting at is this: in your mind, you testified in regard to the testing out of this apparatus as an important feature in this case,—the main thing, is it not? On your direct examination you stated there was some question, but subse-

[fol. 152] quently when I cross examine you, your recollection is more clear?

"A. Yes, clear from the way you put it.

"Q. At the time Mr. Rogers was questioning you on the subject of testing out this light, you had a very vague recollection?
"A. I do not say a very vague recollection,—it is the way you put it when you ask me the question.
"Q. You were not clear at the time Mr. Rogers was examining you, your recollection was not clear?
"A. It was clear enough when you asked me.
"Q. But it was not clear then?
"A. Not entirely.
"Q. That is why you used the words "if I remember right"?
"A. Yes.
"Q. As soon as the accident was reported to you, you came on board and went down in the fireroom?
"A. Yes.
"Q. And you say these lights were working from a socket which was on the side of the vessel?
"A. Came from a socket, evidently from the main wire.
"Q. Where does the main wire enter the vessel?
"A. Down through the engine room skylights.
"Q. Does it ever come through the engine room door into the fireroom?
"A. Yes.
"Q. Or did it come from the skylight room?
"A. I think they all came on the one wire.
"Q. Your recollection now is that the main feed wire came through the fire room and not through the engine room?
"A. No, it came down through the engine room skylights into the door of the fireroom. Only one wire came aboard.
[fol. 153] "Q. One main feed wire connecting with the power on shore came on board the skylight over the engine room, then that went into the engine room?
"A. Yes.
"Q. It then split off into two wires?
"A. Yes.
"Q. One connected with a socket which furnished lights from the engine room, the other connected from this main wire and left the main wire in the engine room and went into the fire room?
"A. Yes.
"Q. At the point where it entered the fire room, was it lying on the floor, or was it tied up to the door of the fireroom?
"A. That I cannot tell.
"Q. Your recollection is very hazy about all this business, is it not? Did you say all these lights were rigid?
"A. Yes.
"Q. Where did the extension lights that the men were working with connect with this part of the wire that came into the fireroom?
"A. In the fore stokehole.
"Q. At this point, was the main wire lying on the ground or hanging up?
"A. Hung up.

"Q. How high was it hung up?
"A. Well, clear of our heads.
"Q. About how high would you say?
"A. About eight feet.
"Q. Might it not have been ten feet?
"A. No, it was not ten feet, because they could reach up to the socket.
"Q. You say that this main wire has held several sockets?
"A. Yes.
"Q. But you do not remember whether it was two sockets or five?
"A. It was not five.
"Q. How many were there?
"A. I cannot say, there was not five.
"Q. Well, how many?
"A. Two at least.
[fol. 154] "Q. Two, at least, is the best you can say?
"A. Yes.
"Q. How many men were working there in the fire boxes at the time when you arrived?
"A. Nobody working there.
"Q. How many had been working there?
"A. This man he was up in the back connection building the wall, and one man passing him clay and bricks came along to him from the outside.
"Q. Were there two other men doing similar work in the other part of the boiler?
"A. Yes, the other box.
"Q. Was there a division between the two,—a wall, so that one set of men could not see the other?
"A. Yes.
"Q. Were there then two wires with the extension lights running from the socket into these two fire boxes?
"A. Yes.
"Q. Were there any more extension lights than the two?
"A. I do not now remember.
"Q. There may have been three?
"A. There must have been about three when these men were on.
"Q. You say there must have been three, and you said you remembered there was only two sockets in the extension lights?
"A. You said five.
"Q. You think now there were three, and the extension lights were all the lights being used?
"A. Yes.
"Q. They were all alike?
"A. Yes.
"Q. All twenty feet?
"A. They would not be all the same length.
"Q. Approximately twenty feet, and the socket to which these extension wires went was approximately, say, eight feet off the ground?
"A. Yes.

[fol. 155] "Q. And the socket was approximately five feet away from the firebox, is that right?

"A. Yes.

"Q. What was the approximate depth of the firebox?

"A. From the outside of the boiler, about eight feet.

"Q. From the place where the man was lying?

"A. Yes.

"Q. What was the depth of each of the fireboxes?

"A. You have the furnace, you go through the furnace into the firebox, and it is in the middle.

"Q. How many feet was it from the socket, that is what I am trying to get at?

"A. Sixteen feet, at least.

"Q. About sixteen feet?

"A. Approximately sixteen feet, yes.

"Q. When you arrived on the scene of the accident, there was then three wires running from the socket into the firebox, is that correct?

"A. No, there was only two to the firebox, and one to the stokehole.

"Q. There were two wires running into the firebox?

"A. Yes.

"Q. In one of these fireboxes Sanchez had been working according to what was told you?

"A. Yes.

"Q. Another man had been working in the other, is that right?

"A. Yes.

"Q. The third wire ran into the stokehole?

"A. Yes.

"Q. Did you test all three wires?

"A. No.

"Q. Only one?

"A. Yes.

"Q. So that the one you tested was the one Lombardo told you to test?

"A. The one that Lombardo told me caused the accident.

"Q. Did Lombardo stand there and watch you do this work of testing, or did he go away?

"A. He was there.

[fol. 156] "Q. Was there any one present at that time?

"A. Yes.

"Q. Who was present?

"A. Superintendent engineer, Mr. Montgomery.

"Q. Where is he now?

"A. He is right at Pier 67, North River.

"Q. Was he on board the ship at the time you got on there?

"A. Now, he went from on the drydock. I believe we were together at the time of the accident.

"Q. Who arrived there first, did you arrive together?

"A. I cannot say for certain.

"Q. Your recollection is very hazy about all this thing, isn't it?

"A. No.

"Q. Why do you wait so long before you answer my questions?
"A. Because I want to make as sure as possible.
"Q. Are you thinking your answers over?
"A. I am trying to give you as true as I can.
"Q. Are you having some effort to remember?
"A. I want to think myself what I am going to say.
"Q. Are you having considerable difficulty in trying to remember these things?
"A. No, I think before I say.
"Q. You do not remember whether Mr. Montgomery got there first, or whether you got there first?
"A. No.
"Q. Who else was present when you made these tests, except you, Lombardo and Montgomery?
"A. Nobody.
"Q. Did you have any difficulty in recollecting the fact called for in my last question?
"A. Yes, I had to think then too.
"Q. In fact, you are taking considerable time to think after I ask my questions, is that so?
"A. Yes, to answer your questions.
[fol. 157] "Q. You want to be fair in this case?
"A. I certainly do. I have nothing to gain or lose.
"Q. Is it not a fact that you are having considerable difficulty in calling these circumstances that you are speaking about to memory?
"A. Some.
"Q. You say you only tested one wire?
"A. Yes, the one that I was told caused the accident.
"Q. Was that wire the one running from the socket into the firebox?
"A. Yes.
"Q. And it was in place when you examined it?
"A. No, I had it in my hands.
"Q. The wire was down?
"A. The wire was out from the connection when I saw it.
"Q. The end of the wire was out from the back connection of the firebox, but the other end——
"A. Lombardo had ahold of it.
"Q The whole light was down?
"A. Yes, when I saw it. Lombardo handed it to me.
"Q. When you arrived on the scene of the accident, Lombardo handed you a wire which was totally disconnected from the socket?
"A. Yes, sir.
"Q. And Lombardo said this is the wire which caused the accident?
"A. Yes.
"Q. And you then proceeded to connect that wire up to the socket to test the wire to find out whether the installation was all right?
"A. Yes.

"Q. But it was a totally disconnected wire that Lombardo handed you?

"A. Yes.

"Q. Did you notice whether this wire you tested had asbestos tape wrapper around any part of it?

"A. It did.

"Q. And where was this asbestos tape wrapped?

"A. Next to the lamp.

"Q. Around the socket?

"A. Yes.

"Q. Over what length of the wire was the asbestos tape wrapped?

"A. A few inches.

[fol. 158] "Q. And that was next to the socket on the end where the light was?

"A. Yes.

"Q. The end that the man was supposed to carry when he went into the firebox to do the work?

"A. Yes.

"Q. Did the asbestos tape come up all around the socket over the brass?

"A. Yes.

"Q. So that it was completely wrapped around?

"A. Yes.

"Q. Did you remove that asbesos tape at any time?

"A. No.

"Q. Did you run your hand over it?

"A. I went right from one end to the other.

"Q. But you did not remove the asbestos tape to see the condition of the wire underneath?

"A. No.

"Q. You say that portions of this wire were frayed?

"A. Only on the outside covering.

"Q. The outside covering was frayed?

"A. I went over it very carefully.

"Q. You say the entire length of the wire was frayed?

"A. No.

"Q. How much of the outside covering of this wire that you tested was frayed?

"A. Only a few places, here and there.

"Q. Here and there?

"A. Just here and there. You know, these wires get rough usage.

"Q. So there were few spots here and there several inches in length which were frayed?

"A. No insulation was broken.

"Q. How many of these patches, several inches in length each, where the outside covering was frayed?

"A. About five, I should say.

"Q. How far apart were these places?

"A. Along the entire length of the wires. Distributed about the entire length of the wires.

[fol. 159] "Q. Where were you when you were notified of the accident?

"A. I was on the drydock near the propeller.

"Q. What were you doing at the time?

"A. Down at the pier seeing the work carried on.

"Q. Did Lombardo notify you?

"A. No, the first assistant.

"Q. Did the first assistant go with you to the fireroom?

"A. Yes—don't put that down, I am not certain.

"Q. You are not sure?

"A. Not sure, for somebody went for the coroner so I could not say, but at first, we were all there.

"Q. You were present when the coroner arrived?

"A. Yes.

"Q. And the body that the coroner examined was the body of Maximiliano Sanchez?

"A. He was the only dead body aboard the ship.

"Q. It was the same man?

"A. Yes.

"Q. The coroner was Dr. Mord, no question about that?

"A. Yes, Dr. Mord.

"Q. You say these electrical extension wires get very rough usage on board the steamers sometimes, that is they are tramped upon frequently?

"A. Yes.

"Q. They are often lying on the ground and are tramped upon?

"A. Yes.

"Q. That is the ordinary usage they get, is that correct?

"A. Yes.

"Q. The life of a wire such as that; when I say "life" I am referring to the insulation; does it depend upon the usage the light gets, and how long would you say one of these wires would last under the usage that they received while you are on board the "Gorgas"?

"A. These lights are not in constant use. Understand, they might [fol. 160] be used two days now, and then not again until two again.

"Q. It depends upon the amount of usage?

"A. Yes.

"Q. How long had you been on board the "Gorgas" before this accident?

"A. Six weeks.

"Q. Had these three extension wires that were being used on the date of the accident running from the socket into the fireroom ever been used before during the time that you were on board this vessel?

"A. I cannot say for sure. They were using more at that time than usual, but you see when we have our own lights we do not use these portables, so many of them anyway.

"Q. If I understand you correctly, these portable lights and extension wires are only used on occasions when the vessel is tied up, and when the ship's dynamos are not running, is that correct?

"A. No, we use them all the time, but not so many. When our

own lights are in operation we have lights everywhere, but in cases like this when the accident happened, they were necessary to carry on the work.

"Q. How many extension wires did you carry on board the vessel altogether?

"A. About a dozen or about ten.

"Q. These were used doing special work, is that right?

"A. They are used in carrying out the usual work, overhauling.

"Q. How many of these extension wires,—of these twelve that you mention,—were in use on the day of the accident?

"A. Nearly the whole of them.

"Q. How many?

"A. About all.

"Q. For how many days previous had you been using practically all of these wires?

"A. About all the time.

[fol. 161] "Q. For how many days previously?

"A. She came on the drydock previous to that, about two days.

"Q. So this was the second day the wires were in operation?

"A. Yes, sir.

"Q. Prior to coming to the drydock had you taken a voyage?

"A. Yes.

"Q. To Panama and return?

"A. Yes.

"Q. How many days did that voyage consume?

"A. Say, approximately twenty-six days.

"Q. During those twenty-six days, on an average, how many extension wires were used on any one day?

"A. Say five or six.

"Q. You took a trip to Panama and return, and during that trip you used about five or six wires a day, is that right?

"A. In constant operation, yes.

"Q. Where were the other six or seven wires stored during that time?

"A. Some in the stokehole, and some in the storeroom.

"Q. By "stokehole" you mean the place where the coal is kept?

"A. The fireroom.

"Q. The fireroom, of course, when the fires are burning is very hot?

"A. Yes.

"Q. And when the vessel is at sea the fireroom is damp, is it not?

"A. No.

"Q. Salt air comes in, does it not?

"A. Salt air?

"Q. There is a certain amount of salt air from the boilers?

"A. No.

"Q. There is water in the fireroom, is there not?

"A. At times, yes, in the boilers.

"Q. There is a certain amount of evaporation, is there not?

"A. In the boilers.

"Q. There is a certain amount of steam and moisture in the fireroom, is there not?

"A. Moisture, yes.

[fol 162] "Q. Is it not customary, and was it customary on your boat, when your fireroom had a pile of ashes that were hot, to throw buckets of water on those ashes?

"A. Yes.

"Q. And they do that every watch, from time to time?

"A. Yes, but the portable lights are not near these ashes.

"Q. The wire is hung up in the same room with the ashes?

"A. Yes.

"Q. Usually on nails or hooks on the bulkhead?

"A. Yes.

"Q. So there is a certain amount of steam all the time, and vapor in the fireroom?

"A. Vapor, not steam, arising from ashes when they throw water on them.

"Q. And that happens frequently?

"A. About every four hours.

"Q. How many extension wires were on board when you took charge six weeks before this accident?

"A. There was the same number.

"Q. The same ones?

"A. Yes.

"Q. You did not buy any new ones while you were on board?

"A. No.

"Q. Of course, you do not know how many they had on board before that?

"A. No.

"Q. What is the ordinary temperature of the fireroom on the "Gorgas" when the vessel is running full steam?

"A. Varies.

"Q. In New York and in Panama?

"A. It all depends on the time of the year.

"Q. The temperature is the same in Panama?

"A. You asked me about New York just now.

"Q. We will take Panama?

"A. When lying in Panama you do not have full steam.

"Q. When you are in tropical countries what is the temperature?

"A. About 98, around 100.

[fol. 163] "Q. What is the average temperature in the stokehole when you are up in these waters in July and August?

"A. About the same.

"Q. Were these electrical extension wires hanging up against wire or wooden bulkheads?

"A. Iron.

"Q. When you made this test after the accident of one of these electric wires, was it already up in the socket or was it down on the floor?

"A. Down on the floor. Lombardo had it in his hand.

"Q. Was it all coiled up in his hand, or was it partly lying on the floor?

"A. I do not remember that. That is a detail, I think.

"Q. You say you looked at this wire very carefully?

"A. Yes, sir.

"Q. What was the position of the wire as you looked at it?

"A. I passed it through my hand like that.

"Q. You say in five places you found the outside covering for a space of several inches was frayed and worn?

"A. Yes, it was frayed, not worn.

"Q. By "frayed" you mean the strands were loosened up?

"A. They were unwoven and loose.

"Q. You say under these loose ends there was rubber?

"A. Yes.

"Q. When these extension lights are used in ordinary course of business, is it not true that very often a large part of the wire will be lying on the floor?

"A. Yes.

"Q. They are stepped on from time to time—trampled on?

"A. I believe they are.

"Q. So that it is necessary to renew these wires very frequently, is that right, depending upon the amount of usage?

"A. Yes, depending upon the amount of usage.

[fol. 164] "Q. Did you, while you were on board the vessel, make any rules by which the extension wires would have to be geared up, or tied up, something overhead, so that they would not be on the floor?

"A. No, I never gave any such orders, no, sir. It is the common usage to have them tied up off the floor.

"Q. Yet you say these wires were frequently walked upon by the men?

"A. You said so, I did not see any men walking on them. They might walk on them.

"Q. It is a matter of frequent occurence, is it not?

"A. I never seen it, but I believe it is done.

"Q. Did you believe it to be so when you were chief engineer on this vessel before the accident, did you have the same belief then?

"A. Yes.

"Q. Did you take any steps to prevent wires being used in that way, or make any rules or give any instructions to prevent the wires being used in that manner, while you were chief officer?

"A. I never gave any explicit instructions, and understood people using gear would look after it.

"Q. Did you examine this same wire that you examined after the accident on any other occasion?

"A. Previous to the accident?

"Q. At any time?

"A. No.

"Q. Previously or subsequently?

"A. Only at the time I spoke of,—immediately after the accident. The coroner took it away.

"Q. Do you know where that wire is today?
"A. No, the last I saw of it, it was in the coroner's office.
"Q. You saw it in the coroner's office?
"A. Yes.
"Q. Did you examine it there?
"A. No.
"Q. You do not know definitely whether it was the same wire [fol. 165] from personal observation?
"A. Unless the coroner was telling me a lie.

"Mr. Graves: I move to strike out this answer.

"Q. You have no personal knowledge?
"A. No.
"Q. You never inspected any of these wires during the time you were on board prior to this accident?
"A. No.
"Q. And the only wire you ever inspected was the one wire that Lombardo pointed out, and that was shortly after the accident?
"A. Yes.
"Q. Whose duty was it to inspect these wires on board the vessel?
"A. I am the chief engineer, and I suppose it is all up to me, but anybody taking a light would see whether or not it was in good condition.
"Q. It was up to you as chief engineer on the S/S 'Gorgas' to see that all the apparatus was in good condition and to inspect it?
"A. Yes.
"Q. Of course, you do not know from personal knowledge who gave this particular wire to the man that was killed, do you?
"A. No.
"Q. You were not present at the time it was handed him?
"A. No.
"Q. Did you give orders that this work was to be done that day?
"A. Yes.
"Q. Did you assign the different men to the work?
"A. Yes.
"Q. Including the man that was killed?
"A. Yes.
"Q. Did you tell them that they would have to use extension wires?
"A. Did not specifically state so.
"Q. Is that the light they had always used under similar circumstances, the same men?
"A. Yes.
[fol. 166] "Q. Did you, while you were chief engineer of the 'Gorgas' ever give instructions to any other engineers to inspect any apparatus, on any particular occasion, any electrical apparatus?
"A. No.
"Q. Did you, while you were chief engineer, make any rules as to inspection of electrical apparatus?
"A. No.

"Q. And, of course, having made no rules you did not communicate any rules to anybody, that goes without saying?

"A. Yes.

"Q. What was around these wires under the frayed out covering,—was it rubber?

"A. Black rubber.

"Q. Do you know the thickness of the rubber?

"A. About one-sixteenth of an inch.

"Q. You could see the rubber through these frayed places, could you?

"A. Yes, you could.

"Q. You say you could not see any copper?

"A. No sign of copper.

"Q. Was there a sill at the bottom of the fire room door and between the fire room and engine room, or was it flush with the deck?

"A. No, not flush.

"Q. Is there a sill on the floor?

"A. Yes.

"Q. How high?

"A. Two feet.

"Q. The stokehole floor was about two feet lower than the engine room floor, and you had to go down to the latter room to get to the stokehole?

"A. Yes.

"Q. And this wire went through that door,—the main feed wire?

"A. Yes.

"Q. When the men are working around the stokehole and using these extension wires, is there not a certain amount of refuse and materials lying on the floor of the stokehole?

"A. Yes.

[fol. 167] "Q. Cement boxes, piles of cement and various tools?

"A. Yes.

"Q. And the extension wires go over debris when in use?

"A. Not the extension wires, no.

"Q. I thought you said it was a matter of frequent occurrence for extension wires to be lying on the ground and trampled on?

"A. Now, you are getting away again.

"Q. I am talking about ordinary usage, they would be under feet at times, and in fact, I am referring to times that may have occurred before you come on board the vessel?

"A. Maybe. The usual practice is to keep the wires up out of everybody's way.

"Q. Don't you as an experienced engineer know that the kind of seamen that you get on boats nowadays do not live up to rules, and those wires are frequently underfoot?

"A. I do not know what happens on other ships. What do I know about the other ships? You want me to stick to the point; why not stick to the point in this matter?

"Q. You are still in the employ of the Panama Railroad Company?

"A. Yes.

"Q. Did you work for them before you took charge of this vessel?
"A. Not directly.
"Q. Had you worked for them indirectly?
"A. Yes.
"Q. How many years?
"A. Back and forth in the shop.
"Q. Prior to this accident, you had never had a steady job with the Panama Railroad?
"A. No.
"Q. And you now have a steady job with them?
"A. Yes."

Mr. Wagner: Defendant rests.
Mr. Graves: Plaintiff rests.

ARGUMENT OF COUNSEL

Mr. Wagner: I wish at this time to renew the motions made at the [fol. 168] opening and made at the close of the plaintiff's case to dismiss the complaint, first, on the ground that the Surrogate's Court issuing the letters had not proper authority to issue the same; second, that the so-called Jones Act under which this action is brought is unconstitutional in that it seeks to take away the property of this defendant without due process of law and thereby violates the Fourteenth Amendment to the United States Constitution. On the third ground that this ship, having been in a drydock within the State of New York at the time of the happening of this accident, that this plaintiff and the deceased and beneficiaries are bound by such sums as shall be allowed under the Workmen's Compensation Law of the State of New York, and cannot recover here. On the fourth ground that the so-called Jones Act provides that an action of this kind must be brought in the district in which the defendant has its principal place of business, which appears here that the principal place of business of defendant is in the Southern District of New York, the State of New York, Borough of Manhattan.

I move to dismiss on the further ground that plaintiff has not shown any negligence or any cause of action against this defendant.

The Court: Motion denied with exception to defendant.

Mr. Wagner: I have exceptions to all of those rulings.

The Court: Yes.

[fol. 169] Mr. Wagner: Now, I ask your Honor to direct a verdict in favor of the defendant on the grounds set forth.

The Court: Motion denied.

Mr. Wagner: Exception.

The Court: Do you want to have this case submitted under the common law or the Jones Act?

Mr. Graves: I think in this case the law would be practically the same.

The Court: It would not be the same thing on the question of contributory negligence.

Mr. Graves: Is your Honor going to go under the Jones Act?

The Court: On the Jones Act.

Mr. Wagner: Then I make the motion to dismiss the complaint on the ground there has been no pecuniary loss or loss of expectancy of any pecuniary benefits through the death of this deceased to any of the beneficiaries mentioned in said Act.

The Court: Motion denied and exception.

Mr. Wagner: I ask for direction of verdict on the same grounds

The Court: Motion denied and exception.

Mr. Wagner summed up the case for the Defendant.

Mr. Graves summed up the case for the Plaintiff.

[fol. 170] The Court then charged the jury as follows:

Charge of the Court

Gentlemen of the Jury: At the outset we should have a clear idea of our respective functions. The court, for the trial of a case such as this, consists of a jury and a judge. You, as the jury, are the sole and exclusive judges of the facts in this case and I, for the purpose of this trial, and especially at this stage of it, am the sole and exclusive source of the law that you are to apply to the facts. You are to apply the law as I give it to you whether you approve of it being the law or not, and you are to disregard any statement of law made by either counsel at any time during the trial or in the course of argument, except in so far as those statements coincide with what I state to be the law.

Now, in regard to the facts—the only place that you may have recourse to in respect to the facts is the testimony that has been given by the witnesses on the witness stand, or the depositions or testimony taken before the trial which have been read to you. You are to disregard all portions of that testimony that was read in your presence that was stricken out, as if it had never been spoken.

Now, you are free to indulge in inferences of fact based upon the directly-established facts which you accept as being the truth, inferences of fact that appeal to you to be a sound exercise of your reasoning faculties or your judgment. They are legitimately to be in- [fol. 171] dulged in as you indulge in them in the ordinary conduct of your business affairs or in the affairs of life in your respective callings. You are not to arrive at any conclusion of fact based upon any statement of counsel as a matter of colloquy between counsel or between counsel and the Court; that is not evidence and therefore it is not to be made the basis of any conclusion of fact.

You are to consider the element or factor of interest in weighing and deciding upon what testimony you will accept in this case and consider whether or not any witness has allowed his interest in the outcome here to at all effect or taint his testimony. You are to weigh that testimony on the basis of its quality and you are to consider what evidence in this case has a persuasive effect on your judgment by way of inducing its acceptance by you, and such evidence as meets the measure of that standard. In other words, such evidence

is believable and credible, that is the evidence that you should consider and weigh throughout this case in determining upon any particular question of fact that necessarily must be disposed of in arriving at a decision of the questions here of liability and of compensation, in the event there is any liability found.

Now, this particular case is one that must have applied to it the rules of maritime law, and some of those rules are not the same as would be applied in cases that occur in other activities of life, especially on land. Some of you have sat on juries here, which have been passing judgment on just such questions, so you will strike from your mind any recollection for the time being of any rules that have been given to you in any of these other cases with respect to how you are to pass judgment upon liability or fault.

[fol. 172] Charge

Now, the claimed breach that the plaintiff is suing upon here is one of a failure by the defendant to provide a seaworthy vessel and reasonably safe appliances upon that vessel with which to work; to give his exact language it is this: "that it failed to furnish reasonably safe and seaworthy tools and appliances and to keep the same in a proper state of repair," and he further complains that the injuries that resulted in the death of the decedent were caused by the "dangerous and defective and unseaworthy condition of said wiring and its appurtenances, which were part of the equipment and appliances furnished by the defendant for such work, and because the same was defective, dangerous and out of repair and not properly insulated or protected, of improper construction and design and wholly unsuited for the purposes for which it was furnished."

Now, the measure of duty owing by this defendant to the plaintiff's decedent was this: it is obligated to furnish a seaworthy vessel and reasonably safe appliances with which to do the work that the plaintiff's decedent was called upon to do. Now, if it has failed in that regard, in that duty,—and that duty is a primary, a nondelegable duty,—in the event you find on other questions that are submitted to you with respect to liability in favor of the plaintiff, there is a basis for a general finding against the defendant.

Now, the plaintiff here is a seaman, coal passer, assigned on this particular occasion to working in this firebox, building some bridge or protection or brickwork or what-not, and on that occaison he had a right to assume that his master had performed his duty in furnishing a reasonably safe means with which to work in the form of [fol. 173] appliances; he had a right to rely upon that and conduct himself accordingly. Now, while working, while he was in that firebox, either actually working or about to be engaged in working, it is conceded that the man met his death by reason of burns which were of electrical origin or cause. Now, the question for you to decide is whether or not the master furnished reasonably safe appliances in the form of properly-insulated wires and lamp with which to work in that place.

Defendant claims that this exhibit is the precise line of cable with the two wires inside, and the socket that was furnished him.

There is no direct evidence in this case that there was any other, but it is claimed by the plaintiff as a matter of inference, that this is not the particular cable or is not in precisely the same condition that it was on the occasion of its use by the plaintiff's decedent, and he *seeks to prove* that claim by the testimony of witnesses that describe the cable that was in use on that occasion as having a portion of the wire exposed close to the socket about a half an inch, that the copper was exposed about a half an inch from the socket and up to the socket. Now, that is a question of fact for you to decide. Who n are you going to believe? If you are going to believe the plaintiff's witnesses on that point as to what they saw, and that that is the fact, as they claim, that that wire was uncovered and exposed at that point, you are free to infer that this exhibit is not the cable that was used on that occasion, or if it was the cable, it is not in precisely the same condition now as it was then on the occasion of its use by the plaintiff's decedent. If, however, you do not believe these witnesses, [fol. 174] and believe that they are mistaken or that they mistake the condition and that the fact was that a piece of this outer covering was off and that the exposure of the two inside wires was merely an uncovering to view of the insulation on the wires, and nothing more, and that is what they had in mind that was exposed, why then, you will go to the further question as to whether or not the type of the appliance that was used and furnished, was a reasonably safe appliance as a matter of type and form for the particular kind of work that the defendant had called upon the plaintiff's decedent to do.

Now, the defendant claims that it was the usual and ordinary type and kind and that the wire was as it now appears,—completely and perfectly insulated and that no harm could come to anyone using it in the ordinary fashion in which the plaintiff was called upon to work, and yet it is the fact that the man died from electrical burns and that he got them while in the fire-box in a room where this cable was with this socket and we had no proof of any other means of contact between the decedent and the electricity in this case, other than this cable and this wire and this socket.

Now, was that a reasonably safe appliance? If so, you must bring in a verdict for the defendant. If it was not, you are to determine what would have been a reasonably safe appliance. The plaintiff claims that a reasonably safe appliance for work of that character was a lamp of a different type with a wooden handle and more complete protective insulating equipment in the form of rubber and brass attachment alongside of the end of the wooden handle, and also a double globe and a wire over it, a sample of which has been furnished and offered in evidence.

[fol. 175] Now, the defendant admits that that type of lamp is used on board vessels but that it is limited in its use to the outside or upper decks where lamps are subjected to the elements and exposed to mist and rain.

Now, you will consider whether you will believe or not the testimony on the plaintiff's side that the usual type of lamp used down in the fire-room and fire-box in that portion of the ship was of that

type, and that it was the kind that was offered in evidence. If that is a reasonably safe type and the usual type that is used and you find that the other type that was in fact used was an unsafe type, why when, you are free to hold that there has been a breach by the defendant of the duty owing to the plaintiff's decedent of furnishing a reasonably safe appliance, and passing judgment upon that, you will consider the circumstances under which the plaintiff's decedent was called upon to work and the character of work he was engaged in and whether the elements with respect to surrounding circumstances did not approximate the elements that would be found on the upper deck or on the outside.

In other words, did it give him a lamp that would be ordinarily safe to use in dry quarters, and give him a job to work in under conditions of wetness, and fail to furnish a lamp of reasonably safe character for those conditions, the conditions under which he was to work, and if it did, and you find that he came to his death by reason of the failure to furnish a safe appliance, why, then, you are free to hold that the defendant has breached its duty owing to the plaintiff's decedent in failing to furnish reasonably safe appliances. [fol. 176] Now, if on the contrary, you find it to be the fact that the usual and ordinary and reasonably safe lamp was the kind that was furnished by the defendant and that there was no defect in the insulation and that for some reason in connection with an undisclosed cause, incapable of being disclosed—because the man is dead and no one actually saw just how he was conducting himself prior to his death in the course of the use of this wire—and you conclude that a reasonably safe appliance was furnished by this defendant, why then, you must bring in a verdict for the defendant on the question of type, and on this first question of condition of appliances that was furnished; but if you conclude that this lamp was of an unsafe type, was not a reasonably safe type for use under the circumstances this plaintiff's decedent was called upon to use it, and that by reason of that fact he met his death, you are then free to resolve that question of whether or not the duty owing by the defendant to the plaintiff's decedent was breached or not in favor of the plaintiff. If you so conclude, the next question you pass on to is whether or not the plaintiff's decedent was guilty of any contributory negligence. Now the plaintiff's decedent is deemed to have assumed the ordinary risks that are incidental to his calling. He is not deemed to have assumed any risks that grow out of any breach of a primary duty owing by the defendant to the plaintiff's decedent, in the matter of furnishing reasonably safe appliances, because being a seaman, he is obligated to use that which is furnished to him on the assumption, which is the law, that he is entitled to rely upon, that the master will make good any defects in appliances in the course of the work under [fol. 177] operation. So that, if you find that this accident occurred, not by reason of any defect in the appliance, not by reason of any defect in the character of the type of appliances that were furnished, but by reason of something that was incidental to his calling and inherent in the nature of the work that he was called upon to do, why then, you must bring in a verdict for the defendant, because the

palintiff's decedent is deemed to have assumed that risk. It goes with his calling, the work of a seaman, a coal-passeer on a vessel, which is more dangerous than a ballroom dancing instructor or something of that sort. What is inherently dangerous in one calling is a' sent in another, and it is these incidental risks he is deemed to have assumed, but if he met his death not because of any of those, but because of defect in the apparatus or by reason of the defective type of apparatus furnished to him, and in that respect there was a breach of the duty owing by the defendant to the plaintiff's decedent, why then, he is not deemed to have assumed that risk.

So, if you should find that he did not meet his death by reason of any risk inherent in his calling, that he is deemed to assume, then you will go on to the question as to whether or not he met his death by reason of negligence, contributory negligence of his own, by reason of the manner in which he conducted himself on the occasion. Now that you will have to decide as a matter of inference from the directly-established facts, and all the surrounding circumstances as to whether he did anything in the matter of working in there of a negligent sort that caused his death, either independent of the character of the appliance furnished or partly because [fol. 178] of the character of the appliance furnished. Now if you find that his death was due solely and wholly to contributory negligence, some fault of his own and the manner in which he conducted himself by reason of the manner in which he was handling the appliance furnished to him, why then, you must bring in a verdict for the defendant; but if you find that he was guilty of contributory negligence that only partly contributed to the result, why then, you will reflect the degree to which his negligence contributed to the result in the assessment of damages, and I will give you that rule in a moment.

Now, if you find that the defendant was negligent you will proceed to the question of contributory negligence, but if you find that the defendant was not negligent you will bring in a verdict for the defendant. If you find the plaintiff's decedent was negligent and that was the sole negligent cause of this accident, you will bring in a verdict for the defendant, but if you find that the defendant was negligent and the plaintiff's decedent free, in whole or part, from contributory negligence under the rules I have given you, then you will proceed to the question of assessment of damages.

Now, the rule with respect to the assessment of damages in the event that you find the plaintiff's decedent was wholly free from contributory negligence and that the defendant was negligent, is this: you will fix upon a fair and just sum that will adequately compensate the next of kin for the pecuniary loss they have suffered by reason of this accident and the death of the decedent. Now, pecuniary loss means money loss. If you find it to be the fact in this case [fol. 179] that the next of kin, who are the mother and two sisters and brother, never were in receipt of any money and had not within a reasonable period while he was alive been in receipt of money from the plaintiff's decedent—when I say "plaintiff's decedent", the plain-

tiff is suing as administrator and the deceased is the plaintiff's decedent—why then, you have a situation, in the event that you resolve the questions of negligence in favor of the plaintiff and against the defendant, where there has been a wrong done, but no damages have ensued to his next of kin other than merely nominal damages. But if you find it to be the fact from the directly testified-to facts, if you accept them to be true, that this plaintiff's decedent did in fact contribute regularly or irregularly sums of money to the support of the mother, who was 56 years of age, and of the one sister and the one brother who were twins under the age of 18, and the maintenance of the household in which they lived down in Venezuela, then you will determine as best you may what the extent of that contribution was and consider that in connection with the man's age and such testimony as is here with respect to his health, his earning power, the fact that he was then earning $75,—and the pay is somewhat less now for the kind of work he was doing—his expectancy of life, the cost of carrying on that household down there, and the statement that he bore that cost or bore any part of it at all, and all the surrounding circumstances of a similar character that are in this case that you believe, and fix upon a lump sum that will make the next of kin whole in that regard.

[fol. 180] Now, in the event that you arrive at the question of assessment at all in this case, there should not be incorporated in that sum anything for sentimental loss or injury or wrong done to the affections to any of his surviving next of kin. It is a cold-blooded right that is given here by statute. It is all by statute. At common law there was no such right, a cold-blooded statutory right given here to permit a pecuniary loss being compensated for, the money loss. Now, all of us know of instances where a man in the community could die today and his dying today would result in no money loss to anybody connected with him; and there are other people who, if they died today, there would be money loss accruing to their parents or relatives by reason of their having contributed to and been a source of income and support to them. You will determine in which class decedent was and the extent to which he was in the class which you find he was in, and compensate on the cold-blooded basis of money value and money injury that has ensued by reason of the death of this man.

You will give full compensation in that regard in the event that the plaintiff's decedent was wholly free from contributory negligence and the fault was wholly and solely that of the defendant; but if you find that he in part contributed to the result by reason of negligence or fault, you will determine the degree to which he was at fault and cut down the amount of the assessment in proportion to the extent that his negligence bears to the total negligence involved. To illustrate:—and this is not an intimation of mine that the rule of proportionate negligence should be followed at all in this case or [fol. 181] that it should not be applied but merely to make clear by illustration how you should apply it in the event that you decide that the situation is one where it should be applied—suppose for instance that the defendant was 90 per cent negligent and the plaintiff's

decedent was 10 per cent negligent and you decide, we will say,—and this is not an intimation of damage in this case, either, but merely for example purposes—that the damages were $10. You would cut the assessment from ten to nine dollars; if it was the other way around and it was 90 per cent fault on the part of plaintiff's decedent and 10 per cent on the defendant, the assessment would be $1, or if the percentage was different for whatever it was, 40 or 50 or 60. That is the rule of proportionate negligence that is peculiarly applicable in maritime cases. In the event, however, that you find that there was no contributory negligence, if you find there was no contributory negligence here at all, why then, the rule of proportionate negligence and its effect on assessment of damages, does not apply. You will apply the full assessment and a fair basis, a compensatory basis and not a punishing basis.

Of course, you will not include in such sum, in the event that you arrive at the assessment of damages, anything for funeral expenses or anything of that sort, because we have no evidence along that line of any expenditures.

Mr. Wagner: Does your Honor want to refuse to charge the other requests here?

The Court: I think I have charged them.

Mr. Wagner: May I submit them and take a general exception to not charging them as submitted?

[fol. 182] The Court: No, we have got to get a straight record. I will read them and charge them or not. Defendant's request No. 1,—that interest of each beneficiary must be measured by his or her individual pecuniary loss; that is the direction I have given to the jury. That is charged but of course it would be incorporated in the lump sum I have already charged.

The second request, that there is no liability on the part of the defendant unless the beneficiaries were dependent on the deceased or suffered pecuniary loss by his death. I so charge; I think I have already charged it.

The third request: Unless the plaintiff shows that the beneficiary named in the statute has been deprived of reasonable expectation of pecuniary benefits by the wrongful death of the employe, the damage is strictly limited to the financial loss thus sustained. I so charge, and think I have.

The fourth request: That the damages of such dependents are limited to the present cash value of such amounts. I so charge.

The fifth request: That the interest of each dependent must be measured by his or her individual pecuniary loss, and that is for the jury to determine. I so charge.

Sixth request: The damage is not dependent on any legal liability of the deceased to the beneficiaries.

I so charge.

The seventh request: There may be no verdict for funeral expenses. It is charged.

The eighth request: Plaintiff must show that beneficiaries were dependent on deceased before any recovery can be had. I so charge.

[fol. 183] The ninth request: That deceased assumed the ordinary risks of his employment. I so charge. The tenth request: That the jury must determine any negligence on the part of the deceased and make suitable allowance therefor. I have already charged that; I charge it again, in the event that you find any, and that is a question of fact for the jury.

The eleventh request: That deceased made occasional gifts to defendant is not sufficient to prove pecuniary loss. I so charge.

The twelfth request: No adverse conclusions can be based upon the failure of defendant to produce any witness. I so charge, excepting it should appear that in the course of the testimony any witness were not produced that could have been produced as being actually connected with or in the control of the defendant. An exception, if there is anything you want to except to in that.

The thirteenth request: No evidence that deceased contributed balance needed to support his dependents.

Mr. Wagner: There is no evidence here to show that the deceased contributed the balance between the amount that the brother contributed and the amount to run the house.

The Court: I so charge. It is for the jury to decide what amount he did contribute, if at all.

Mr. Wagner: I am going to ask your Honor to charge the usual charge about the motions made.

The Court: In regard to these motions made by the defendant, you are not to arrive at any inference of fact based on the making [fol. 184] of these motions. The effect of them, so far as you are concerned is this: that I am of the opinion that this is a case where both parties, the plaintiff and the defendant, are entitled to the benefit of your judgment on the facts, and that is all that the denial of that motion means, so far as your passing judgment on the facts is concerned.

Mr. Graves: I ask your Honor to charge that it was the duty of the defendant to use reasonable care in inspecting that appliance from time to time.

The Court: I so charge.

Verdict

(At 2:50 P. M. the jury returned and found a verdict in favor of the plaintiff in the sum of $9,900.)

Argument of Counsel

Defendant's Counsel: I ask that the verdict be set aside on the exceptions taken on the trial; on the further ground the jury has not determined in whose favor the money is found—that is, which of

the beneficiaries are to receive it; on the further ground that the verdict is contrary to the evidence, contrary to the law, and on the other grounds set forth in 549 of the Civil Practice Act.

The Court: What do you say, Mr. Graves, in regard to having them specify?

Plaintiff's Counsel: The statute specifically says that it shall be brought in the name of the administrator, for the benefit of the next of kin.

Defendant's Counsel: My understanding is that they must specify as to how it is to be distributed.

[fol. 185] The Court: Have you any case that so states. We will keep the jury here until you show me a case.

Defendant's Counsel: It will take a lot of time.

Plaintiff's Counsel: I never heard of such a case.

The Court: You will have the time to do so. I will keep the jury right where they are and we will have the motion stand as made.

INSTRUCTIONS TO JURY

The Court: I am going to have the jury retire in connection with this verdict.

GENTLEMEN OF THE JURY: I wish you to retire to your jury room and bring back what the agreement among you is with respect to how the $9,900 should be apportioned as among the next of kin, and which particular next of kin you deem to have been in receipt of financial assistance from the plaintiff decedent; that is to say, you will come back with an amendment to your verdict which will state the proportions that are to go to the next of kin, and name them. For instance, if you conclude that the widow should get one-half, and the minor daughter and son of the widow—the twins—if those three were the ones that received financial assistance, you can make the proportions in accordance with what you deem to be the proportions that they did receive financial assistance. For instance, if those are the three, you will say: One-half to the widow; one-quarter to the minor brother, and one-quarter to the minor sister. If you conclude from the evidence that the other brother was in receipt of any financial assistance you will make the proportion accordingly; but if you have excluded him from your $9,900 verdict and have concluded that the only [fol. 186] one that were i nreceipt of financial assistance were those that were in the household—the minor son and the minor daughter—the twins—and the widow, then state what the proportions are with respect to those three: One-half and one-quarter and one-quarter, or two-thirds and one-sixth and one-sixth; or whatever you deemed to be the true and proper proportions of financial assistance that was received by them from the plaintiff decedent. You will retire and bring in your verdict accordingly, with your verdict in its present state as the basis for your action.

Defendant's Counsel: May I note an exception at this time to permitting the jury at this time to retire to amend their verdict, and take an exception to the further charge as delivered.

The Court: All right.

(The jury thereupon retired.)

(The jury subsequently returned and stated they found a verdict for the plaintiff in the sum of $9,900; to be awarded to the mother.)

ARGUMENT OF COUNSEL

Defendant's Counsel: I move to set aside the verdict on the ground of the exceptions taken at the trial; on the ground it is contrary to law; on the ground it is contrary to the evidence; on the further ground that the verdict is excessive, and on the other grounds set forth in Section 549 of the Civil Practice Act. I ask to set it aside on the further ground that the jury, having failed to apportion the damage, had no right to amend their verdict, after having once rendered same.

The Court: How about the amount?

Plaintiff's Counsel: I think that is a thing that should be taken up on further consideration, if your Honor wants to take it up. I know that I had a verdict of $11,000 rendered in this court house three weeks ago in one of these Brighton Beach wrecks, where the [fol. 187] mother was about the age of this woman, fifty-six years of age, also an invalid; the mother also earned $50 a month, while the daughter earned $100, and the daughter contributed $25 a month to the mother; and the verdict was not upset. It did not go up on appeal, and the trial judge sustained the amount as to the verdict, and it was not appealed. I have quite an elaborate brief on that case.

The Court: I have been over the ground of the amounts of verdicts so often that I will rule on it now. The motion is denied. I think you have covered everything.

Defendant's Counsel: Exception.

The Court: Thirty and sixty days.

Brooklyn, N. Y., May 3, 1923.

Present: Carswell, J.

This matter having come on for reargument of defendant's motion to set aside verdict, after hearing counsel for the respective parties:

Motion granted, unless plaintiff stipulates within ten days that verdict may be reduced to the sum of seven thousand dollars, in which event, motion denied.

[fol. 188] STIPULATION RE EXHIBITS

It is hereby stipulated that any and all exhibits introduced on the trial shall be omitted from the printed record, but that counsel for either party shall have the right to produce any or all of said exhibits on the argument of this appeal.

Dated, New York, N. Y., Aug. 23, 1923.

Frederick R. Graves, Attorney for Plaintiff-Respondent.
Richard Reid Rogers, Attorney for Defendant-Appellant.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

David J. Wagner, being duly sworn, deposes and says that he was the counsel in charge of the trial of this action on behalf of the defendant, and that no opinion was given by the Trial Judge herein.

David J. Wagner.

Sworn to before me, this 18th day of July, 1923. Katherine F. Schroeder, Notary Public, Kings Co. No. 236. Certificate filed in New York Co. No. 608. N. Y. Co. Reg. No. 4575.

[fol. 189] STIPULATION RE EVIDENCE

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action, and that the same may be settled and ordered on file, and annexed to the judgment roll herein.

Dated, New York, N. Y., Aug. 23, 1923.

Frederick R. Graves, Attorney for Plaintiff-Respondent.
Richard Reid Rogers, Attorney for Defendant-Appellant.

ORDER SETTLING CASE

Pursuant to the foregoing stipulation, the foregoing case is hereby settled and signed by me and ordered on file and annexed to the judgment roll herein.

Dated, Sept. 29, 1923.

Wm. B. Carswell, J. S. C.

[fol. 190] IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true copies of the notice of the appeal, judgment roll, and case and exceptions in this action on file in the office of the Clerk of the County of Kings, and certification thereof by said Clerk is hereby waived.

Dated, New York, N. Y., Aug. 23, 1923.

Frederick R. Graves, Attorney for Plaintiff-Respondent.
Richard Reid Rogers, Attorney for Defendant-Appellant.

IN SUPREME COURT OF NEW YORK

ORDER FILING CASE

Pursuant to Section 616 of the Civil Practice Act, it is

Ordered that the foregoing printed case and exceptions be filed in the office of the Clerk of the Appellate Division of the Supreme Court for the Second Department.

Dated, Sept. 29, 1923.

Wm. B. Carswell, J. S. C.

[fol. 191] IN SUPREME COURT OF NEW YORK

OPINION APPELLATE DIVISION

Agapito Vasquez, as administrator, etc., of Maximiliano Sanchez, deceased, respondent, v. Panama Railroad Company, appellant.—Judgment modified by striking out the item of $717.50, being interest on the verdict, on authority of Lynott v. Great Lakes Transit Corporation (202 App. Div. 613, 621), and as so modified the judgment, and the order, are unanimously affirmed, without costs. Present: Kelly, P. J., Rich, Jaycox, Kelby and Kapper, JJ.

IN SUPREME COURT OF NEW YORK

[Title omitted]

MODIFICATION AND AFFIRMANCE—Jan. 11, 1924

The above named Panama Railroad Company, the defendant in this action, having appealed to the Appellate Division of the Su-
[fol. 192] preme Court from a judgment of the Supreme Court en-

tered in the office of the Clerk of the County of Kings the 12th day of May, 1923, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been argued by Mr. Richard Reid Rogers, of counsel for the appellant, and by Mr. Frederick R. Graves, of counsel for the respondent, and due deliberation having been had thereon.

It is ordered and adjudged that the judgment and order so appealed from be and the same is hereby modified by striking out the item of $717.50, being interest on the verdict, and as so modified the judgment and the order are hereby unanimously affirmed without costs.

Enter,

William J. Kelly, Presiding Justice.

Supreme Court, Appellate Division, Second Judicial Department, ss.

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action, and entered in my office on the 11th day of January, 1924, and that the original case upon which said appeal was heard are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 11th day of January, 1924.

John B. Byrne, Clerk. (Seal.)

[fol. 193] In Supreme Court of New York

[Title omitted]

Judgment on Decision of Appellate Division—May 12, 1924

Judgment in this action in favor of the plaintiff and against the defendant, Panama Railroad Company, in the sum of Seven Thousand Eight Hundred and Ninety-five and 30/100 Dollars ($7,895.30) having been rendered in this Court and entered on the 12th day of May, 1923, and the defendant, Panama Railroad Company, having appealed from said judgment to the Appellate Division of this Court for the Second Department and said judgment having been unanimously affirmed and modified so as to strike out the sum of Seven Hundred and Seventeen and 50/100 Dollars ($717.50), being interest on the verdict, without costs of appeal, and said judgment of

affirmance having been rendered thereon on the 11th day of January, 1924, and the record of appeal and a certified copy of said judgment having been duly filed in the office of the Clerk of the County of Kings, it is

Now, on motion of Frederick R. Graves, Esq., attorney for the plaintiff herein,

[fol. 194] Ordered and adjudged that said judgment so appealed from be, and same is, in all things affirmed except for the disallowance of $717.50 interest on the verdict and that said judgment, heretofore entered in the office of the Clerk of this Court on the 12th day of May, 1923, be modified by striking out the item of $717.50, being interest on the verdict, and as so modified the judgment of the Appellate Division is hereby made the judgment of the Supreme Court of Kings County.

Enter,

William E. Kelly, Clerk.

IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that the above named defendant hereby appeals [fol. 195] to the Court of Appeals of the State of New York from a judgment entered in the office of the Clerk of the Supreme Court of Kings County on the 12th day of May, 1924, upon a decision of the Appellate Division of the Supreme Court for the Second Department, modifying a judgment of the Trial Term of the Supreme Court of Kings County entered on the 12th day of May, 1923, and affirming said judgment as so modified; and this appeal is taken from the whole and every part of said judgment entered upon the decision of the Appellate Division, except that part of it which strikes out from the judgment below the item of $717.50, being interest on the verdict.

Dated, New York, N. Y., May 15th, 1924.

Richard Reid Rogers, Attorney for Defendant.

Office & P. O. Address, No. 63 Wall Street, Borough of Manhattan, New York City.

To Frederick R. Graves, Esq., Attorney for Plaintiff, 256 Broadway, New York City; Clerk of the County of Kings, County Court House, Borough of Brooklyn, City of New York.

[fol. 196] IN SUPREME COURT OF NEW YORK

STIPULATION EXHIBITS IN COURT OF APPEALS

It is hereby stipulated that the exhibits introduced on the trial, or any of them, shall be produced at the argument of this appeal upon the request of counsel for either party.

Dated, New York, N. Y., June 24, 1924.

Frederick R. Graves, Attorney for Plaintiff-Respondent.
Richard Reid Rogers, Attorney for Defendant-Appellant.

IN SUPREME COURT OF NEW YORK

CLERK'S CERTIFICATE

STATE OF NEW YORK,
County of Kings, ss:

I, William E. Kelly, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record) Do hereby certify that I have compared the annexed with the original Papers on Appeal filed in my office Dec. 26, 1924 and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 28 day of January 1925. Wm. E. Kelly, Clerk. (Seal King's County.)

[fol. 197] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal herein to the Appellate Division of the Supreme Court for the Second Department, the opinion of the Appellate Division of the Supreme Court, the order of the Appellate Division modifying the judgment below and affirming it as modified, the judgment entered in the office of the Clerk of Kings County upon the decision of the Appellate Division, and the notice of appeal from said judgment, now on file in the office of said Clerk; and certification thereof by the Clerk is hereby waived.

Dated, New York, N. Y., June 24, 1924.

Frederick R. Graves, Attorney for Plaintiff-Respondent.
Richard Reid Rogers, Attorney for Defendant-Appellant.

[fol. 198] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT—Dec. 26, 1924

A judgment having been recovered in the above entitled action in this Court on the 12th day of May, 1923, in favor of the plaintiff and against the defendant in the sum of Seven Thousand Dollars ($7,000.00) and said judgment and the whole thereof having been appealed to the Appellate Division of the Supreme Court of the Second Department, and the same having been unanimously affirmed with modifications and an appeal having then been taken to the Court of Appeals of the State of New York and

It appearing from the remittitur exhibited that the same has been unanimously affirmed with costs it is

Now, on motion of Frederick R. Graves, Esquire, attorney for the plaintiff,

Ordered and adjudged that the judgment of the Court of Appeals be and the same is hereby made a judgment of the within Court.

Stephen Callaghan J. S. C.

Granted Dec. 26, 1924. William E. Kelly, Clerk.
O. K. T. J. L.
Enter.

[fol. 199] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 12th day of May, 1923, in the sum of Seven Thousand Eight Hundred and Ninety-five and 30/100 ($7,895.30) Dollars, and the defendant having appealed from said judgment to the Appellate Division of this court in and for the Second Department and the said judgment having been unanimously affirmed in all things by this court at said Appellate Division with modifications so as to strike out the sum of Seven hundred and Seventeen and 50/100 ($717.50) Dollars, being interest on the verdict, without costs of appeal and a judgment of affirmance having been entered thereon on the 12th day of May, 1924, in the office of the County Clerk of Kings County, and the defendant having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein the 26th day of December, 1924, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly and has remitted the

judgment of said Court of Appeals to be executed according to law and this Court having by an order duly entered herein the 27th day of December, 1924, ordered that said judgment be made the judg-
[fol. 200] ment of this court and plaintiff's costs having been duly fixed at the sum of One Hundred and Eight and 28/100 ($108.28) Dollars.

Now, on motion of Frederick R. Graves, attorney for the plaintiff, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Brooklyn, 19th January, 1925.

William E. Kelly, Clerk.

O. K. T. J. L.

State of New York,
County of Kings, ss:

I, William E. Kelly, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original papers on appeal filed in my office Dec. 26, 1924, and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 28 day of Jany. 1925.

Wm. E. Kelly, Clerk. (Seal Kings County.)

[fol. 201] Supreme Court of the United States

On Petition for Writ of Certiorari to the Supreme Court of the State of New York

Order Granting Petition for Certiorari—March 9, 1925

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of New York, and of the argument of counsel thereupon had.

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

No. 260

FILED
SEP 19 1925
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1925.

PANAMA RAILROAD COMPANY,
Plaintiff-in-Error,

against

AGUIPITO VASQUEZ, as administrator of the goods, chattels, and credits which were of MAXIMILIANO SANCHES, deceased,
Defendant-in-Error.

Motion to Advance Case on Calendar.

FREDERICK R. GRAVES,
Attorney for Defendant-in-Error,
No. 29 Broadway,
New York City.

RICHARD R. ROGERS,
Attorney for Plaintiff-in-Error,
No. 63 Wall Street,
New York City.

Supreme Court of the United States

OCTOBER TERM—1925.

PANAMA RAILROAD COMPANY,
Plaintiff-in-error,

AGAINST

AGUIPITO VASQUEZ, as administrator of the goods, chattels, and credits which were of MAXIMILIANO SANCHES, deceased,
Defendant-in-error.

Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that on the annexed affidavit of Frederick R. Graves, and of Arthur Lavenburg, and on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, October 5th, 1925, at The Capitol in the City of Washington, in the District of Columbia, at opening of court on said day or as soon thereafter as counsel may be heard, a motion, of which the foregoing is a copy, and I shall

submit with said motion and in support of the same the argument advanced in the annexed affidavits.

Dated, New York, September 12th, 1925.

Your etc.,

FREDERICK R. GRAVES,
Attorney and Counsel,
for the Defendant-in-Error,
29 Broadway, New York, N. Y.

To:

RICHARD REID ROGERS,
Attorney for Plaintiff-in-Error,
63 Wall Street,
New York City.

Motion to Advance Case on Calendar.

SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM—1925.

PANAMA RAILROAD COMPANY,
Plaintiff-in-error,

AGAINST

AGUIPITO VASQUEZ, as administrator of the goods, chattels, and credits which were of MAXIMILIANO SANCHES, deceased,
Defendant-in-error.

Now comes AGUIPITO VASQUEZ, administrator as aforesaid, the defendant-in-error, by Frederick R. Graves, his counsel, and moves this court to advance the hearing and argument of the above stated case on the calendar of the court for the reason that the question presented for determination on the record is whether or not the state courts have jurisdiction of actions brought under the Act of Congress of June 5th, 1920, commonly known as the Jones' Act. There are numerous cases now pending in the state courts and brought under the provisions of the Jones' Act, the trials of which said actions are being held up awaiting the determination of the question presented to this court in this case, and if consideration of this case awaits its regular appearance on the

calendar of this court it is apprehended that the Statute of Limitations will intervene to bar the bringing of actions in the Federal courts should this court decide that the state courts have not jurisdiction under the Jones' Act, and for this reason motion is made to advance the argument of this case so that in the event it is decided that the state courts have not jurisdiction then and in that event the litigants in the actions now pending may preserve their rights by starting actions in courts having jurisdiction.

Yours, etc.,

FREDERICK R. GRAVES,
Attorney and Counsel,
For Defendant-in-Error.

Affidavit of Frederick R. Graves, in Support of Motion.

SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM—1925.

PANAMA RAILROAD COMPANY,
Plaintiff-in-error,

AGAINST

AGUIPITO VASQUEZ, as administrator of the goods, chattels, and credits which were of MAXIMILIANO SANCHES, deceased,
Defendant-in-error.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FREDERICK R. GRAVES, being duly sworn, deposes and says:

That he is the attorney and counsel for the defendant in error in the above stated case.

Deponent states that the question presented by the record in said case is whether or not the state courts have jurisdiction to entertain actions brought under the provisions of the Act of Congress of June 5, 1920, commonly known as the Jones' Act which Act makes applicable to seamen the provisions of the Federal Employers Liability Act.

Deponent states that he is the attorney for the plaintiff in about a hundred cases now pending in the state courts, trials in which have not

been had for the reason that he is awaiting determination of the jurisdictional question raised by this record; and upon information and belief other attorneys having numerous other cases of similar nature have assumed the same attitude.

Deponent says that in a great majority of cases now pending in the state courts the statute of limitations will soon expire and bar the bringing of another action and in the event this court should decide that the state courts have not jurisdiction over actions brought under the provisions of the Jones' Act the litigants in the state court cases now pending will have to bring their actions in another court, and unless this question is decided with considerable promptness the bar of the statute of limitations will very likely intervene to prevent the bringing of other actions, in which event the litigants would be denied and deprived of a day in court and go without redress for their wrongs.

Deponent says that it is of the utmost importance to these many litigants that the question presented by this record be determined before the statute of limitations operates to bar the bringing of another suit.

Therefore deponent moves and prays this court to advance the hearing and argument of this case on the calendar.

FREDERICK R. GRAVES.

Sworn to before me this
11th day of September, 1925.

SIMONE N. GAZAN,
Notary Public.
New York County Clerk's No. 427,
New York County Register's No. 7403,
My Commission expires March 30, 1927.

Affidavit of Arthur C. Lavenburg, in Support of Motion.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1925.

PANAMA RAILROAD COMPANY,
Plaintiff-in-error,

AGAINST

AGUIPITO VASQUEZ, as administrator of the goods, chattels, and credits which were of MAXIMILIANO SANCHES, deceased,
Defendant-in-error.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR LAVENBURG, being duly sworn, deposes and says:

That he is an attorney at law and a member of the Bar of the State of New York.

Deponent says that he is counsel of record for a number of seamen who have actions for damages for personal injuries pending in the state courts under the provisions of the Act of Congress of June 5th, 1920, commonly known as the Jones' Act.

Trial of these actions have been deferred awaiting a determination of the question before this court as to whether or not state courts have

jurisdiction to entertain actions under the provisions of the Jones Act.

Deponent says that a number of his cases are cases in which the causes of action arose nearly two years ago and that they will soon be barred by the statute of limitations for which reason it is desirable that the jurisdictional question now before this court may be decided promptly and before the statute of limitations operates to bar the actions.

ARTHUR LAVENBURG.

Sworn to before me this
11th day of September, 1925.

SIMONE N. GAZAN,
Notary Public.
New York County Clerk's No. 427,
New York County Register's No. 7403,
My Commission expires March 30, 1927.

No. [redacted]260

JAN 29 192[redacted]

WM. R. STANSB[redacted]
CL[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

[redacted] 1925

PANAMA RAIL ROAD COMPANY,

Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,

Respondent.

NOTICE OF APPLICATION, PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

RICHARD REID ROGERS,
Solicitor for Petitioner,
No. 63 Wall Street,
New York City.

The Rodin Press, 67 Warren St., N. Y. Tel. Walker 1600.

Notice of Application for Writ of Certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,
Respondent.

Sir:

YOU WILL PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari to the Supreme Court of the State of New York for the County of Kings, will be presented to the Supreme Court of the United States at its court room at the Capitol, City of Washington, on Monday, February 9th,

1925, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Dated, New York, N. Y., January 26th, 1925.

Yours, etc.,

RICHARD REID ROGERS,
Solicitor for Panama Rail Road Company,
Petitioner.

To:

FREDERICK R. GRAVES, Esq.,
Solicitor for Agapito Vasquez,
Administrator, etc.

Petition for Writ of Certiorari.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1924.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased,
Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petition for a writ of certiorari, requiring the Supreme Court of the State of New York for the County of Kings to certify to the Supreme Court of the United States for its review and determination the case of Agapito Vasquez, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased, plaintiff-respondent, against Panama Rail Road Company, defendant-appellant.

The petition of the Panama Rail Road Company respectfully shows to this honorable court:

FIRST: This action was commenced by the service, on behalf of Agapito Vasquez, administrator, etc., the plaintiff in the trial court, of a summons and bill of complaint upon the Panama Rail Road Company, defendant in said court, on September 23, 1921, said action being brought in the Supreme Court of the State of New York for the County of Kings, Trial Term, and the said complaint praying for the recovery of damages by reason of the death of the plaintiff's intestate, in the sum of $35,750, said death being alleged by the plaintiff to have resulted from negligence of the defendant and its employees, by means of which the person of the plaintiff's intestate sustained personal injuries causing his death. The plaintiff's intestate was a seaman in the employment of the defendant, and his injuries were sustained while so employed, and on board a vessel of the defendant, and subsequent to the enactment of the Act of Congress of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, which amended the Act of March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185, so as to provide that in case of the death of a seaman as a result of a personal injury sustained under certain circumstances specified in said Act, the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury—said Act of June 5, 1920, being conveniently known as the "Jones Act"; and the aforesaid action was instituted under the provisions of said Jones Act.

SECOND: Issue having been duly joined, said action was tried in the said Supreme Court for the County

of Kings on the 25th and 26th days of April, 1923, and the defendant moved to dismiss the action on the ground that pursuant to the terms of Section 33 of said Jones Act, the state courts were without jurisdiction of actions instituted under said Act. This motion was denied, and judgment was entered for the plaintiff. An appeal was taken from said judgment to the Appellate Division of the Supreme Court for the Second Department, and on said appeal the defendant again contended, on the same ground as previously, that the state courts were without jurisdiction. The Appellate Division thereupon rendered a decision modifying the judgment of the Trial Term in a certain particular which is not material here, but affirming the judgment in the main, and upholding the jurisdiction of the state courts, and upon said decision a judgment was entered on the 12th day of May, 1924, in the office of the Clerk of the County of Kings, which is the place of record of the Supreme Court for the County of Kings, in favor of the plaintiff. Thereupon an appeal was taken from said judgment by the defendant to the Court of Appeals of the State of New York, on the ground that by the terms of Section 33 of the said Jones Act, the state courts were without jurisdiction of an action instituted under said Act; and on the 16th day of December, 1924, the said Court of Appeals made its order affirming the decision of the Appellate Division, and remitting the said order with the record of all proceedings to the Supreme Court for Kings County for the taxation of costs to the plaintiff, and for enforcement according to law. Thereupon, on the 19th day of January, 1925, a final judgment was duly rendered by said Supreme Court for the

County of Kings upon said order and remittitur of the Court of Appeals, in favor of the plaintiff and against the defendant.

THIRD: Your petitioner shows that the said judgment of the Supreme Court for the County of Kings upon the order and remittitur of the Court of Appeals of the State of New York was and is a final judgment in the highest court of the State of New York in which a decision in said suit could or can be had.

FOURTH: Your petitioner is advised and believes that the said judgment of the Supreme Court for the County of Kings upon the remittitur of the Court of Appeals of the State of New York is erroneous for the following reasons:

(a) That said court was without jurisdiction to hear and determine said cause, or to render said judgment in favor of the plaintiff, because it is provided in Section 33 of the aforesaid Act of Congress of June 5, 1920, known as the Jones Act, which Act applied to the injury complained of, and under which the said action was instituted, that jurisdiction of such an action as is provided for by the said Act, shall be under the jurisdiction of the court of the district in which the defendant-employer resides, and that the effect of the said language, among other things, is to provide that jurisdiction of an action brought pursuant to the said Act shall be confined to the courts of the United States.

(b) That the said judgment was further erroneous in that the record shows that there was no un-

seaworthiness upon the part of the vessel or its appurtenances or appliances, or negligence upon the part of the owner of the vessel, or any of its employees.

FIFTH: Your petitioner believes that this cause is properly reviewable by this court upon a writ of certiorari, because there was especially set up and claimed therein by the plaintiff (respondent in this application) a right or privilege under a statute of the United States, to wit: the right or privilege of having the said cause heard and determined in the courts of the State of New York; and the decision of the highest court of said state, now complained of by your petitioner, was in favor of such right or privilege.

SIXTH: Your petitioner further shows that the question as to whether the state courts have jurisdiction under Section 33 of the Jones Act is one as to which adverse views have been expressed by the federal and state courts, and as to which no final decision has been rendered by this Court, the question having been apparently reserved by this Court in the recent case of the *Matter of the East River Towing Co.* Thus in *Barrington* v. *Pacific Mail SS. Co.*, 282 Fed. 900, the District Court of Oregon held that no other court except the court of the district in which the defendant's principal place of business was located had jurisdiction of an action under the Jones Act. To the same effect was the decision of Cushman, J., in *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. 812, 818. In *Lorang* v. *Alaska SS. Co.*, 298 Fed. 547, 549, Judge Netterer of the District Court of Washington, held with

reference to Section 33 of the Jones Act, that it must be conclusively presumed that it had reference to the "national" district court.

SEVENTH: Your petitioner is further advised that a writ of certiorari has been granted by this court in the case of *Engel* v. *Davenport* (No. 697, Oct. Term, 1924) to the Supreme Court of California, which court first held that the state court had no jurisdiction under the Jones Act, although this decision was qualified on rehearing.

EIGHTH: Your petitioner further shows that a number of cases have been brought in the state courts upon the assumption that the state courts have jurisdiction, and that it is desirable in the interest of a proper construction of the statute above referred to, that a final decision should be rendered by the Supreme Court of the United States fixing the jurisdictional rights of litigants under this section.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York for the County of Kings, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of New York in the said case therein entitled "Agapito Vasquez, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez, deceased, plaintiff, against Panama Rail Road Company, defendant," to the end that the said case may be re-

viewed and determined by this court as provided in Section 237 of the Judicial Code of the United States, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said statute, and that the said judgment of the said Supreme Court of the State of New York in the said case, and every part thereof, may be reversed by this honorable court.

PANAMA RAIL ROAD COMPANY,
By EDWARD A. DRAKE,
Vice-President.

(Seal)

Attest:

W. R. PFIZER,
Secretary.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
CITY AND COUNTY OF NEW YORK,

EDWARD A. DRAKE, being duly sworn, deposes and says that he is vice-president of the Panama Rail Road Company, the petitioner above-named; that he has read the foregoing petition; that the same is true to his knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

EDWARD A. DRAKE.

Sworn to before me this
26th day of January, 1925.

T. F. BURRELL,
Notary Public
(Seal) for New York County.

I HEREBY CERTIFY that the foregoing stated grounds in support of the foregoing petition for a writ of certiorari in the above-entitled case are in my opinion well founded in points of law.

RICHARD REID ROGERS,
Solicitor for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1924.

Brief in Support of Application for Writ of Certiorari.

This action was brought under Section 33 of the Act of Congress of June 5, 1920 (41 Stat. 1007), amending Section 20 of the "Seamen's Act" (38 Stat. 1185) commonly known as the "Jones Act," to recover damages for the death of a seaman upon the defendant's steamship "General W. C. Gorgas." The action was brought in the Supreme Court for Kings County, State of New York, was affirmed by the Appellate Division, and further affirmed, without opinion, by the Court of Appeals of the State of New York.

The ground upon which the petitioner seeks a writ of certiorari is that under the Jones Act the state court was without jurisdiction; and in this connection, the petitioner begs to point out there has been as yet no definite opinion by any court of the United States settling this much-mooted question. In the State of New York the early decisions were against the jurisdiction of the state courts (see *Nox* v. *U. S. S. Board,* 193 N. Y. Supp. 340, and *Prieto* v. *U. S. S. Board,* 117 Misc. 703). Upon the other hand, the Appellate Division in *Tammis* v *Panama Rail Road Co.,* 202 App. Div. 226, and *Lynott* v. *Great Lakes Transit Corp.,* 202 App. Div. 613, sustained the jurisdiction of the state court in an action brought under the Jones

Act. The only opinion rendered by the Court of Appeals in which the matter is discussed is in *Patrone* v. *Howlett*, 237 N. Y. 394, 397, in which it is said the Jones Act provides for the venue, when the action is brought in the United States court, "and *probably* that is as far as it goes in defining jurisdiction." In *Engel* v. *Davenport*, 228 Pac. 710, 712, the Supreme Court of California at first held that the state court was without jurisdiction, but on rehearing reversed this decision upon the assumption that the matter had been disposed of by the decision of this Court in *Johnson* v. *Panama Rail Road Co.*, 264 U. S. 375. However, in that case, the action was originally brought in a federal court, and the only question involved was whether it should have been brought in the court of the district wherein was located the defendant's principal place of business. This court, observing that both district courts had general jurisdiction of the subject-matter, held that the right to try the case in one district rather than the other had been waived by failure to raise the point by special appearance. The question involved here is a fundamental question, as to whether or not the exclusive jurisdiction conferred by the Constitution upon the courts of the United States in maritime cases has been asserted under the provisions of the Jones Act. If so asserted there would seem to be no doubt that the jurisdiction of the federal courts is exclusive. That the case of *Johnson* v. *Panama Rail Road Co., supra,* was not deemed by this court as a final decision upon this point, would seem to follow from the apparent reservation of this question made in the recent case of the *Matter of the East River Towing Co.*

Upon the other hand, the decisions of the United States District Courts, so far as they go, seem to fairly hold that the jurisdiction of the federal courts is exclusive. See *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. Rep. 812, 817, opinion by Judge Cushman. To the same effect is *Lorang* v. *Alaska SS. Co.*, 298 Fed. 547, 549, opinion by Judge Netterer. See, also, *Barrington* v. *Pacific Mail SS. Co.*, 282 Fed. 900.

The principle upon which it is contended that the state court has no jurisdiction of an action under the Jones Act is that the Jones Act for the first time creates a new liability upon the part of the shipowner towards seaman employees, viz., the liability of a railroad towards its employees, including a liability, among other things, for the negligence of a co-employee, which previously did not exist under the maritime law. This new general liability upon the part of the shipowner is coupled with a provision for a special remedy, and if this be true, it would seem to follow that this remedy alone, to wit, an action at law or in admiralty in the federal court, must be pursued (see *Pollard* v. *Bailey*, 20 Wallace 520; *Middletown National Bank* v. *Toledo etc. Railway Co.*, 197 U. S. 394, 405, and *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 365). In the *Middletown National Bank* v. *Railway Co.*, *supra*, this principle was applied in an action brought outside of the State of Ohio to recover dues from stockholders of that state, and it was held that the action could not be maintained, but that "the statutory method providing for the enforcement of rights in the courts of the state must be followed."

Your petitioner is advised that a writ of certiorari has been granted on the petition of the plain-

tiff in the case of *Engel* v. *Davenport, supra,* to review the decision of the Supreme Court of California. The plaintiff, however, in that case assumes the jurisdiction of the state court, and the point sought to be reviewed is the question as to whether the state statute of limitation or the statute of limitation prescribed by the Employers' Liability Act, now incorporated in the Seamen's Law, applies. The case would seem, however, to indirectly involve the question of jurisdiction as between the state and federal court in an action brought by a seaman. But whether that case directly covers the question of jurisdiction in all its aspects or not, it would seem appropriate that the writ of certiorari should be allowed in the present case, first, to settle the jurisdictional scope of a federal statute of general application as to which there exists at present great confusion; and, second, that the rights of this defendant should be properly protected in event that this court should in the meantime hold in any other case that the state courts are without jurisdiction under the Act in question.

Respectfully submitted,

RICHARD REID ROGERS,
Solicitor for Petitioner.

FILED
OCT 3 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—1925.

No. 260.

PANAMA RAIL ROAD COMPANY,

Plaintiff-in-Error,

against

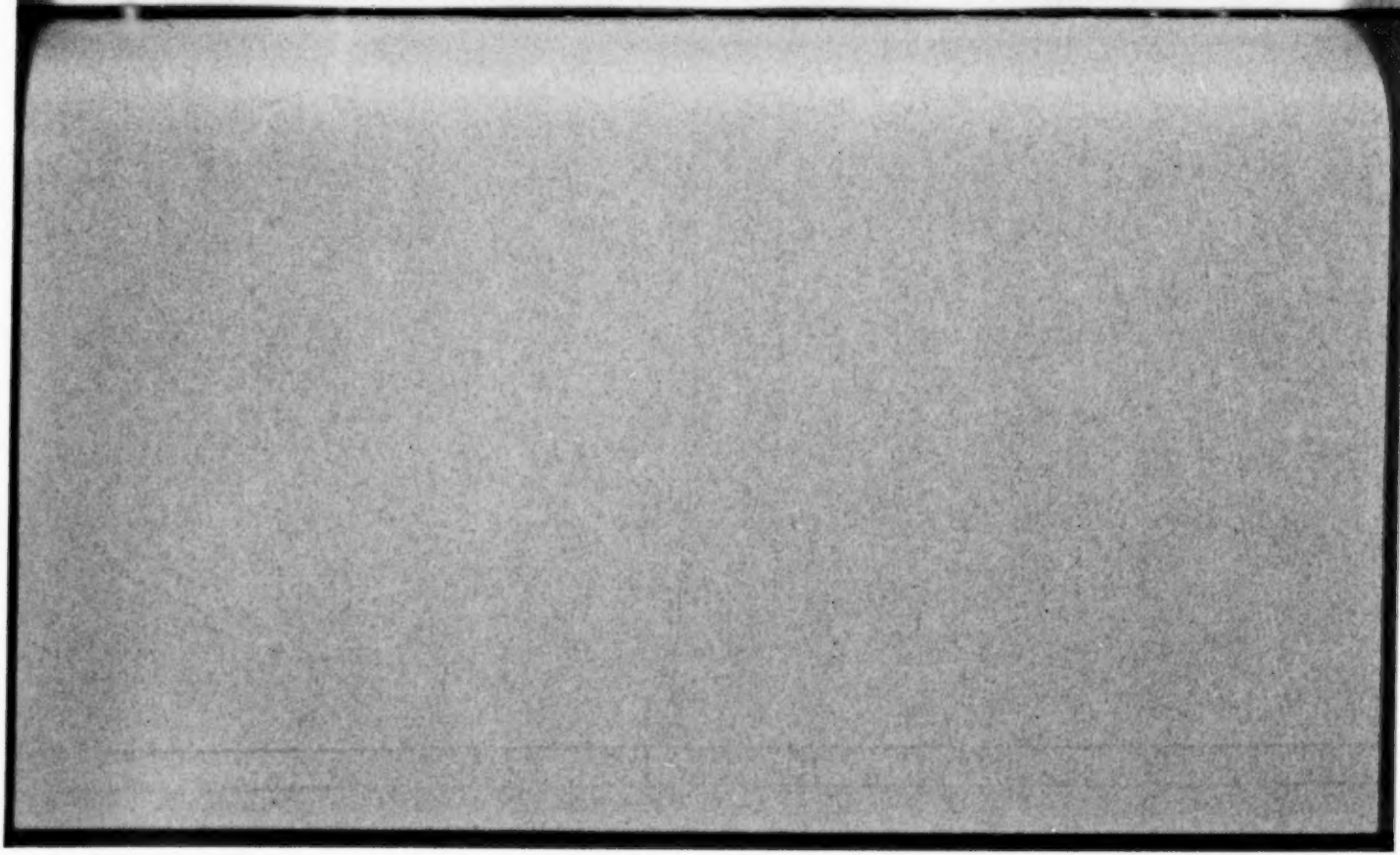
AGUIPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanches, deceased,

Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR CONCURRING IN MOTION TO ADVANCE CASE.

RICHARD REID ROGERS,
Solicitor for Plaintiff-in-Error,
No. 63 Wall Street,
New York City.

The Hecla Press, 57 Warren St., N. Y. Tel. Walker 1490.



Supreme Court of the United States

OCTOBER TERM—1925.

PANAMA RAIL ROAD COMPANY,
Plaintiff-in-Error,

against

AGUIPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanches, deceased,
Defendant-in-Error.

Counsel for plaintiff-in-error hereby concurs in the motion to be made in this Court by counsel for defendant-in-error on Monday, October 5th, 1925, for advancement of this cause on the calendar of said Court.

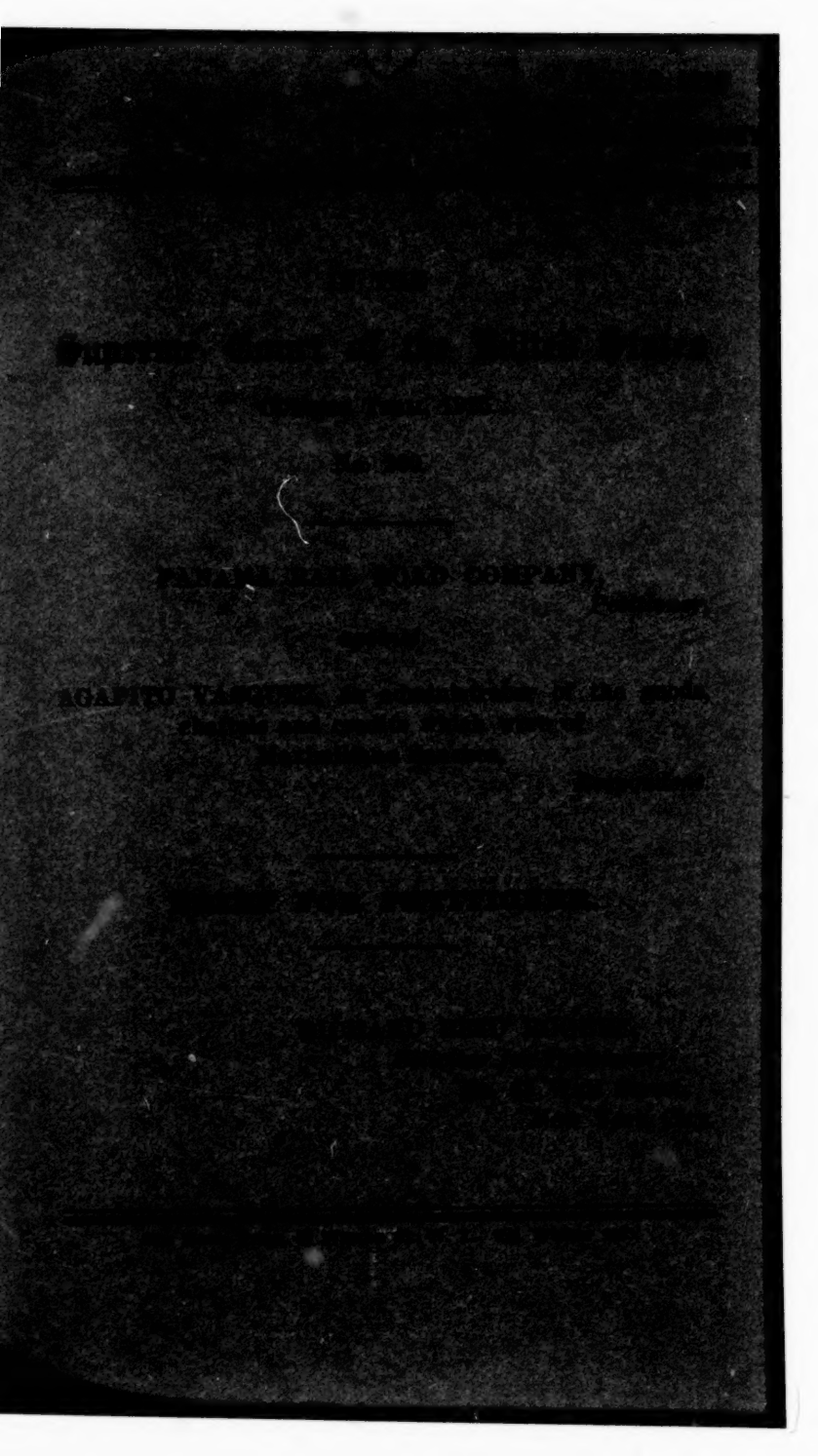
This appeal involves the question whether the Courts of the several States have jurisdiction of actions brought under Section 33 of the Act of Congress of June 5th, 1920, 41 Stat. 1007, commonly known as the "Jones Act," relating to the rights of seamen to recover against their employers for personal injuries sustained in the course of their employment.

As more particularly pointed out in the brief of the petitioner in support of the application for the writ of certiorari which has been granted by this

Court, a conflict of decisions exists upon the foregoing jurisdictional question. The question has never been passed upon by this Court, and it is important in the interests of all parties concerned that a decision thereof should be had as early as possible.

Respectfully submitted,

RICHARD REID ROGERS,
Solicitor for Plaintiff-in-Error.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 260.

PANAMA RAIL ROAD COMPANY,
Petitioner,

against

AGAPITO VASQUEZ, as administrator of the goods, chattels and credits which were of Maximiliano Sanchez,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

Statement.

This is an action brought by Agapito Vasquez, administrator, to recover damages for the death of his intestate, Maximiliano Sanchez. Sanchez was a coal passer on board the steamship "General W. C. Gorgas," owned and operated by the Panama Rail Road Company, and his death occurred from an electric shock received by him while working in the fire room of that vessel while lying in drydock at Staten Island (Rec., p. 16). Sanchez was

engaged in building a wall between one of the boilers upon the vessel and the one opposed to it. He had with him a portable electric lamp connected by cable with the source of current from the shore. He apparently fell and in falling broke the globe of the lamp which he was carrying in his hand. His death was instantaneous, and was attributed to electric shock. Negligence was alleged upon the ground that the wire and its appurtenances were dangerous and out of repair, and not properly insulated and protected. The cable was produced upon the trial, and showed no apparent defect in the insulation. Moreover, the insulation was adequately tested at the time of the accident and found to be perfect (Rec., p. 90).

The question involved in this appeal, however, is not that of negligence, but one of jurisdiction as between the state and federal courts. The action was brought under Section 33 of the Act of Congress of June 5, 1920, commonly known as the "Jones Act," in the state court in Kings County, State of New York. The defendant's principal place of business was in the Borough of Manhattan, County of New York, State of New York. The County of Kings lies within the jurisdiction of the Eastern District of the United States Courts of the State of New York, and the defendant's principal place of business lies within the jurisdiction of the Southern District of the United States Courts in the State of New York.

The Jones Act (amending Section 20 of the Seamen's Act of March 4, 1915), 41 U. S. Stats. 1007, provides as follows:

> "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or

remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Upon the opening of the case, the defendant moved to dismiss the complaint upon the ground that the state court had no jurisdiction, and upon the further ground that it appeared that the defendant's office was in the County of New York (Rec., p. 10). A verdict was rendered for $9,900, which the trial court reduced to $7,000, and from the judgment entered upon this verdict an appeal was taken to the Appellate Division of the Supreme Court for the Second Department, and there affirmed (Rec., p. 120). From the decree of affirmance by the Appellate Division, an appeal was taken to the Court of Appeals of the State of New York, which affirmed the case without opinion (Rec., p. 124). From this final judgment of the court of last resort in the State of New York a writ of certiorari was sued out to this court, which was allowed (Rec., p. 125). The case was then advanced for argument. The sole point involved upon this appeal is the question as to whether the state court had jurisdiction of the action.

POINT I.

The state court is without jurisdiction of a death action brought under the Jones Act.

There has been up to the present time a conflict of judicial opinion upon the point whether the state courts have jurisdiction of actions brought under the Jones Act. In certain early cases in New York (*Nox* v. *U. S. S. Board,* 193 N. Y. Supp. 340, and *Pricto* v. *U. S. S. Board,* 117 Misc. 703) it was held by different judges that the state courts had no jurisdiction. Upon the other hand, the Appellate Divisions in New York in the cases of *Tammis* v. *Panama Rail Road Co.,* 202 App. Div. 226, and *Lynott* v. *Great Lakes Transit Corp.,* 202 App. Div. 613, sustained the jurisdiction of the state courts in such actions. The case of *Lynott* v. *Great Lakes Transit Corp., supra,* was affirmed without opinion by the New York Court of Appeals (234 N. Y. 626), just as the judgment of the Appellate Division in the present case was affirmed without opinion. The only opinion rendered by the Court of Appeals in which the matter is even remotely discussed is *Patrone* v. *Howlett,* 237 N. Y. 394, 397, and even there, as will be seen from the accompanying extracts, the consideration was somewhat casual. The Court of Appeals declined to dismiss that case because the point of jurisdiction was not made by the appellant, the Court saying at page 397:

> "Jurisdiction herein relates to the subject-matter of the action and cannot be conferred by consent. The court may of its own motion dismiss the action where it has no jurisdiction of the subject-matter (Robinson v. Oceanic S. Nav. Co., 112 N. Y. 315, 324). If the United States has prescribed the conditions under which action for death of a seaman may be brought so as to exclude the state courts,

> the litigants cannot dispense with those conditions. Appellant does not make this point. It asks to have the complaint dismissed on the merits. In view of our decision in the Lynott case, I think that we should not dismiss the complaint on our own motion for lack of jurisdiction."

The Court, however, proceeded to say:

> "The Jones Act gives a seaman an action at law in place of the common-law remedy reserved to him in addition to his action *in rem* in admiralty by the Judiciary Act of 1789. Prior to its passage he had the right to resort to the state courts whenever they were competent to give a remedy. It does not expressly or by necessary implication take away the right to resort to the state courts. It provides for the venue, when the action is brought in the United States court, and probably that is as far as it goes in defining jurisdiction. We have in effect so held in the Lynott case (supra)."

In *Engel* v. *Davenport,* 67 Cal. Dec. 325, a personal injury suit, and now in this court on certiorari, the Supreme Court of California has held both ways upon this question; being influenced on the rehearing by the decision in *Johnson* v. *Panama Rail Road Co.,* hereinafter referred to.

Upon the other hand the early decisions of the United States District Courts seem to fairly hold that the jurisdiction of the federal courts is exclusive. See *Wenzler* v. *Robin SS. Co.,* 277 Fed. 812, 817, opinion by Judge Cushman. To the same effect is *Lorang* v. *Alaska SS. Co.,* 298 Fed. 547, 549, opinion by Judge Neterer. See, also, *Barrington* v. *Pacific SS. Co.,* 282 Fed. 900, opinion by Wolverton, J.

In the more recent decisions in the United States District Courts, dealing with the question of removal to the federal court of actions which have been instituted in the state courts under the Jones Act, the federal courts as-

sumed the state court jurisdiction. In *Beer* v. *Clyde SS. Co.*, 300 Fed. 561, and *Herrera* v. *Pan American Petroleum Co.*, 300 Fed. 563, Judge Augustus Hand reached the conclusion that the Jones Act adopted the Employers' Liability Act *in toto*, including the provision contained in the latter prohibiting the removal to any court of the United States of any action brought by express authority of that Act in the state courts. In *Atianza* v. *U. S. Shipping Board*, 3 Fed. (2nd) 845, Judge Garvin followed the decision of Judge Hand. In the recent unreported case of *Cook* v. *Alaska SS. Co.*, Judge Neterer remanded a case brought under the Jones Act to the state court upon the ground that this court in *Re Matter of Petition of East River Towing Co.*, 266 U. S. 355, had recognized the concurrent jurisdiction of state and federal courts under the Jones Act.

The decision of this question, however, seems up to the present time to have been avoided by this court. In *Johnson* v. *Panama Rail Road Co.*, 264 U. S. 375, in which the constitutionality of the Jones Act was affirmed, the action was brought in the federal court of the Eastern District of New York, and in that case it was held that the only question involved was whether it should have been brought in the federal district wherein the defendant's principal place of business was located. But this court observed that both district courts had general jurisdiction of the subject-matter, and that the right to try the case in one federal district rather than the other was waived by the failure to raise the point by special appearance. The question involved here, however, is the fundamental question of the jurisdiction as between the state and federal courts, and as said by the Court of Appeals in *Patrone* v. *Howlett, supra*, "if the state court has no substantive jurisdiction of such an action, it cannot be conferred by consent."

In *Matter of Petition of the East River Towing Co.*, 266 U. S. 355, the question of the jurisdiction of the state court in an action brought under the Jones Act was apparently reserved. This seems to follow not only from the guarded language with which the opinion in that case concludes; but it also must be assumed that if that case had been deemed decisive of the question here involved, the writ of certiorari in the present case would not have been allowed.

The contention that the state court is without jurisdiction in an action brought under the Jones Act to recover damages for injuries resulting from the death of a seaman in maritime territory is predicated upon two grounds: *First*, the action is maritime in its nature, and there now exists under the laws of New York no concurrent jurisdiction in the state courts to recover damages for the death of a seaman occurring in maritime territory; the jurisdiction of the United States courts, therefore, under the Constitution, the statutory law and the decisions of this court, is exclusive; and *Second*, even if the first proposition be not true, Congress, legislating within its constitutional powers, has now for the first time created a liability upon the part of a shipowner for the death of a seaman in navigable waters occurring within the geographical limits of a state, and has in the act creating this liability provided a special remedy for its enforcement—that is to say, an action in the United States court of the district wherein the defendant resides or has its principal place of business, which remedy, to wit, an action in a federal court, is the only one by which the new right thus created can be enforced.

A.

The action is maritime in its nature, and there now exists under the laws of New York no concurrent jurisdiction in the state courts to recover damages for the death of a seaman occurring in maritime territory; the jurisdiction of the United States courts, therefore, under the Constitution, the statutory law and the decisions of this court, is exclusive.

The jurisdiction of the courts of the United States in maritime matters is exclusive. It is probably made so by the Constitution, but in any event it is so provided in the original Judiciary Act of 1789, and this provision is continued in Section 256 of the Judicial Code, wherein it is stated that the jurisdiction of the courts of the United States in civil causes of admiralty and maritime jurisdiction "shall be exclusive of the courts of the several states," there being saved to suitors in all causes under both provisions of the law, the right of a common law remedy where the common law is competent to give it. The exclusive character of the jurisdiction of the courts of the United States in maritime matters, as was later stated in the case of *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 640, was first called to the attention of this court in *The Moses Taylor,* 4 Wall. 411, 429. The language of Justice Field, delivering the unanimous opinion of the court in that case, was as follows:

> "The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares

> that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the Federal courts."

It might be said that this decision relates to an exclusive jurisdiction established by Congress; but other cases treat the exclusive jurisdiction of maritime causes by the United States courts as constitutional.

In the great case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, this court, through Justice Story, analyzed the maritime jurisdiction of the courts of the United States under Section 2 of Article III with great detail and powerful logic. With respect to the introductory words "the judicial power shall extend," the opinion reached the conclusion that these words were used in an "imperative sense," and that they imparted an absolute grant of judicial power (p. 331). Justice Story then proceeded to classify the judicial powers conferred by the Constitution upon the courts of the United States. He observed that the first class includes cases arising under the Constitution, treaties and laws of the United States, cases affecting ambassadors, and cases of admiralty and maritime jurisdiction. This class is preceded by the word "all." As to the second class, including all other cases of national cognizance, as where the jurisdiction is dependent upon the character of the parties, the word "all" is dropped seemingly, he says, *ex industria*. It is hardly to be presumed that the variation in language could have been accidental. Hence he

concludes that it may have been the intention to imperatively extend the judicial power to all cases of the first class, and as to the second class to leave Congress to qualify the jurisdiction in such manner as public policy might dictate. The vital importance of the cases of the first class is then alluded to as follows (p. 334):

> 'In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty."

Without altogether resting the decision of the court upon the foregoing grounds, he concludes (p. 337):

> "no part of the criminal jurisdiction of the United States can, consistently with the constitution, be

> delegated to the state tribunals; the admiralty and maritime jurisdiction is of the same exclusive jurisdiction."

In *Claflin* v. *Houseman, Assignee*, 93 U. S. 130, it was observed that Congress had not always observed the distinction between those cases of federal jurisdiction where the word "all" precedes the grant, and those cases where it is omitted.

But in *Stevenson* v. *Fain*, 195 U. S. 167, the argument of *Martin* v. *Hunter* was applied to those cases put in the second class by Justice Story, where the word "all" was omitted and the word "controversies" substituted for "cases." The court said:

> "The use of the word 'controversies,' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

The necessary converse of this declaration is, of course, that in the class of causes where the word "all" is used, and the word "cases" takes the place of "controversies," Congress is not authorized to define controversies over which it may exercise jurisdiction and the manner in which it is done. In this connection see the interesting reasoning of District Judge Ervin in the recent case of *Farrell* v. *Waterman SS. Co.*, 291 Fed. Rep. 604.

Again in *Butler* v. *Boston Steamboat Co.*, 130 U. S. 527, the a[illegible]y and maritime jurisdiction was held to be exc[illegible]e. See also *Southern Pacific* v. *Jensen*, 244 U. S. 205, 218.

> that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added 'any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed.' "

It is, of course, possible to find decisions here or elsewhere which seem not altogether consistent with this principle; but it is evident that there could be no such thing as an exclusive admiralty jurisdiction of the courts of the United States, if the test were the ability of state legislatures to create in the state courts remedies assimilated to those prevailing in admiralty. There must be some logical ground then upon which the universally admitted *exclusive* jurisdiction of the federal courts in maritime causes of action can be rested. That is to say, there must be some reasonable limitation imposed upon the scope of the saving clause, or else the proviso would cancel and become more important than the law itself, to which it is only an exception, and would thus become void under the Constitution. The principle no doubt is that first expressed by this court in *The Moses Taylor* (at p. 431), and many times repeated since (*Knapp* v. *McCaffrey,* 177 U. S. 638, 644; *Moran* v. *Sturges,* 154 U. S. 256, 276; *Southern Pacific* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149), that what is saved by Section 9 of the Judiciary Act of 1789 was "not a remedy *in* the common law courts, but a common law remedy." That is to say, that the *concurrent* jurisdiction of the state courts, if reached through the Saving Act, must be based upon a right and a remedy always known to that law, and not upon the arbitrary creation of a new right or a new remedy under the guise of statutory amendment of the common law. Nor is the principle invoked here new or unknown to this court. It was indeed the very primitive doctrine enunciated in this court when

first defining the true scope and limitations of the saving clause. In the important case of *Waring* v. *Clarke*, 4 How. 450, 460, which first brought the admiralty jurisdiction *infra corpus comitatus*, this Court said:

> "In respect to the clause in the 9th section of the Judiciary Act 'saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it' we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away."

It would not seem that this statement can be construed to mean other than this: that where there was no right known to the common law when the Constitution was adopted—and where there was no right there could, of course, be no remedy—there was no concurrent jurisdiction in the state courts; and, therefore, nothing upon which the saving clause could act. This distinction was further elaborated by Justice Story in his commentaries upon the Constitution in a passage which received the express approval of this court in *Taylor* v. *Carryl*, 20 How. 583, 598:

> " 'The reasonable interpretation,' continues the commentator, 'would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modification in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the

> courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction' (3 Story's Com., Sec. 1666, note)."

Now, the case at bar was an action for damages for instantaneous death. It was not an action for injuries received which originally vested in the injured employee, and which upon his death under certain survival statutes may be said to have passed to his beneficiaries, although the distinction perhaps is not of first importance. Such as it was, however, it was an action founded upon a right wholly unknown to the common law (*The Harrisburg*, 119 U. S. 204, 213; *The Alaska*, 130 U. S. 201, 209; *La Bourgogne*, 210 U. S. 95, 138; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240).

"Until a right exists there can be no remedy" (*Dougan* v. *Champlain Trans. Co.*, 56 N. Y., at p. 5). There being neither right nor remedy, therefore, at the common law to support an action such as that in the case at bar, no jurisdiction in the state courts exists which can be saved to them by the proviso of Section 9 of the Judiciary Act.

I speak of the state of the law as it is to-day, and as it was when this action was brought. There was, no doubt, an interval of time between the adoption of Lord Campbell's Act in the State of New York and the passage of the Jones Act, when it was otherwise. Prior to the Jones Act the death statutes of New York extended into maritime territory, and under these statutes an action such as that instituted here could be maintained in the state courts. The state statute indeed was the only statute which at such time gave any right of action whatsoever, and death actions were permitted under that act although the death itself occurred in maritime territory. Such state statutes, filling a vacuum which otherwise would have existed, were given effect in the admiralty courts of the United States "be-

cause they merely supplemented the substantive maritime law" (*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 125; *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95). There was perhaps this inconsistency in thus "supplementing the substantive maritime law" by the adoption of the death statutes of the various states. Such statutes were in no sense uniform. It were indeed conceivable in any state where the principle of Lord Campbell's Act might not have been adopted or might be repealed, that there would be no law upon the subject at all. In some states, as New York, contributory negligence, however slight, would be a bar to the recovery; in other states it would merely diminish the damages. In some states complete damages might be recovered; in others, where a statutory maximum was prescribed, there might be only a partial recovery. The period of time within which such actions could be brought, as well as the law of negligence and the rules of evidence, would greatly vary. And the beneficiaries of a recovery would not be always the same. It might well be doubted whether the principle adopted in *The Hamilton* and succeeding cases, at least to an equal extent with the compensation laws of the several states which were later held to be invalid, did not conflict with "the harmony and uniformity in maritime law which the Constitution not only contemplated but actually established" (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164). That being true, there was every reason why Congress should have passed a statute upon this subject importing a direct change into the maritime law itself (*Johnson* v. *Panama Rail Road Co.*), and introducing a principle of uniformity which the conflicting state laws vicariously adopted by the judiciary were far from supplying. There was also every reason why Congress having occupied the field, the state statutes should no longer be operative. And so, indeed, they ceased to be. This express point was

decided by the Court of Appeals of the state from which this case proceeds, in *Patrone* v. *Howlett,* 237 N. Y. 394, 397. The language of the court in that case is as follows:

> "But plaintiffs did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law (Western Fuel Co. v. Garcia, 257 U. S. 233, 241)."

There being at the present time, therefore, but one cause of action and one remedy for the death of a seaman on navigable waters, occurring within the geographical confines of New York, and that being the right and remedy given by the Act of June 5, 1920, amending Section 20 of the Seamen's Law, the remedy under this Act, to wit, an action in the federal courts of the United States, must necessarily be deemed exclusive of any jurisdiction in the state courts of New York, if any effect whatsoever is to be given to the oft-declared doctrine of exclusive maritime jurisdiction in the courts of the United States.

The ground upon which the appellate courts of New York have apparently upheld the jurisdiction of the state courts of actions brought under the Jones Act, was that this Act contained no specific words of exclusion of state court jurisdiction. But the correct rule is the other way around. Whether it is within the power of Congress to confer state court jurisdiction of a maritime cause where there is no concurrent cause of action under the laws of the state, it is unnecessary to inquire. The position of Congress on this matter has always been that a positive provision of law was necessary to keep alive the state court jurisdiction.

Thus, when under the Act of March 30, 1920 (41 Stats. 538, Compiled Stats. §12511/2), a cause of action was created for wrongful death on the high seas, it was specifically provided by Section 7 "the provisions of any state statute

giving or regulating rights of action or remedies for death shall not be affected."

When, under the Employer's Liability Law, Congress under its power to regulate commerce passed a death statute for the benefit of the families of interstate employees, it likewise provided specifically that the jurisdiction under the new act should be "concurrent with that of the courts of the several states," and that no case so brought should be removable to the United States courts (35 Stats. 66, Sec. 6).

When under the Ship Mortgage Act (41 Stats. 1003), a right of action was conferred upon mortgagees of a vessel to recover pecuniary losses for the failure of the collector of the port or shipowner to comply with the provisions of that Act, it was expressly provided that the jurisdiction of the United States courts should "not be to the exclusion of the courts of the several states."

In the Act of 1845, where the courts of the United States were given the same jurisdiction of torts upon boats of twenty tons burden and upwards navigating the lakes of the several states, as upon vessels navigating the high seas and tidewaters, an express provision preserved the concurrent jurisdiction of the state courts (5 Stats. 726).

In the passage from *The Hine* v. *Trevor,* quoted above, this court laid particular stress upon this circumstance; and in doing so may be said to have approved the rule that in maritime matters an express reservation is required if the otherwise exclusive jurisdiction of the United States courts is to be shared with those of the several states.

B.

Even if the first proposition be not true, Congress, legislating within its constitutional powers, has now for the first time created a liability upon the part of a shipowner for the death of a seaman in navigable waters occurring within the geographical limits of a state, and has in the act creating this liability provided a special remedy for its enforcement—that is to say, an action in the United States court of the district wherein the defendant resides or has a principal place of business; which remedy, to wit, an action in a federal court, is the only one by which the new right thus created can be enforced.

As said in *The Moses Taylor,* 4 Wall. at page 429, "the judicial power of the United States is in some cases unavoidably exclusive of all state authority, and in all others it may be made so at the election of Congress." The Jones Act, in occupying the field to the exclusion of all state laws on the subject, and in providing for the first time for an action for death occurring on the navigable waters within a state, prescribes by the same act the remedy and regulates the jurisdiction: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." So far as I am aware, no court, state or federal, has ever construed the phrase "court of the district in which the defendant employer resides" to mean other than the United States court of such district. The suggestion of the Court of Appeals of New York in *Patrone* v. *Howlett,* 237 N. Y. 394, 397, was that, assuming that

the language meant the district court of the United States, it merely provided for the venue where the suit was filed in a federal court as distinguished from a state court. The argument as to the meaning of this phrase is well set forth by Judge Cushman in *Wenzler* v. *Robin Line SS. Co.*, 277 Fed. 812, 817:

> "In using the words 'shall be under the court of the district,' etc., Congress, doubtless, had mainly in mind the continental United States, comprising the several states. The territory included in a single jurisdiction of a state court may be called a 'district'; but it is not always so designated. It will be noted that the expression is 'court of the district'; the word 'court' and not 'courts' is used —that is, the singular and not the plural.
>
> "In all of the states, the districts in which courts of the United States sit geographically include or cover the same territory that is covered by the courts of the several states in their exercise of general jurisdiction. If it had been intended by this act alone to confer jurisdiction on the United States District Court, and expressly recognize, at the same time, that of the courts of general jurisdiction of the state in which such district court was held, the word used would not have been 'court,' but doubtless would have been 'courts' and it would not have been limited to districts, but language would have been used similar to that of subsection J of Section 30, already appearing in the act before the above-quoted language of section 33, amending section 20 of the LaFollette Act. The language of subsection J, inter alia, is:
>
> > '(c) * * * The District Courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several states, territories, districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. * * *' 41 Stat., p. 1003.

"Congress, in conferring jurisdiction, must be presumed to intend conferring it on its own courts, the national courts. Congress may, of course, within the sphere of national authority, deprive the state courts of jurisdiction. The extent to which it may or may not confer jurisdiction over federal questions upon a state court it is not necessary to consider. The jurisdiction of the state courts being general in its nature, that general jurisdiction may be so far recognized by Congress by legislation concerning the enforcement of rights arising out of federal law as to leave the door of the state court open to the litigant. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

"The language used in the saving clause:

'Saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' Section 24, Judicial Code (3).

—was appropriate to the end in view. Congress did not seek to confer a power, but rather to leave undisturbed any rights to sue at common law, including the right to sue in a state tribunal.

"Section 20 of the La Follette Act, as amended (section 33 of the Jones Act) provides that any seaman may, at his election, maintain an action for damages at law; that is, he does not have to sue in the admiralty, but may sue at law in the District Court. If Congress had intended anything else, the language would have been 'may at his election maintain in the state court an action at law.'"

Assuming, therefore, that the phrase "court of the district" means the federal court of the "district," the general principle of law applies that where a new right is created and the court wherein that right may be prosecuted is defined, no other court has jurisdiction of the

matter. As said by Judge Wolverton in *Barrington* v. *Pacific SS. Co.*, 282 Fed. 900:

> "Jurisdiction under the present statute is not founded upon diversity of citizenship, but upon the fact that the plaintiff is a seaman, and that, being a seaman, he is entitled to his action for personal injuries in a court having jurisdiction of the cause. The action is special to seamen, which creates a new remedy, and the court authorized to entertain jurisdiction of the cause is one specially designated. In the sense, therefore, in which it is so designated, it is constituted, for the purpose of actions by seamen for personal injuries, a court of special, and not general jurisdiction. The mandatory language of the statute indicates as much. Mark the language:
>
> 'Jurisdiction in such actions *shall* be under the court of the district,' etc.
>
> "So it would appear by usual interpretation that no other court has jurisdiction of the cause, except the court of the district in which the defendant employer resides or in which his principal office is located. There is a reason for this; the purpose obviously being to prevent seamen from suing the owners and lessees of vessels in any port of the country away from their residence or principal place of business. There can be no analogy to the statute where general jurisdiction is given on the ground of diversity of citizenship and the venue depends alone upon the residence of the parties. In this view, the case of *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (C. C.), 178 Fed. 117, is without application, and I am unable to agree with its application in Johnson v. Panama R. R. Co. (D. C.), 277 Fed. 859."

The principle, which Judge Wolverton invoked in this case as one of "usual interpretation," has been many times applied in the state courts of the United States (*Reed* v. *Omnibus R. R. Co.*, 33 Cal. 212, 217; *Aldrich* v. *Hawkins*,

6 Blackford [Ind.] 125; *Hendreschke* v. *Harvard High School*, 35 Neb. 400, 401; *Macklot* v. *Davenport*, 17 Ia. 379, 387; *Dodson* v. *Scroggs*, 47 Mo. 285; *Dudley* v. *Mayhew*, 3 N. Y. 11. It is well stated in the case of *Hendreschke* v. *Harvard High School* above, as follows:

> "The rule is well settled that where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested."

The rule has a venerable antiquity in the English law. It was applied in principle by all the judges in England sitting in the celebrated case reported by Lord Coke (*Coke's Reports*, Pt. 7, 36, 37a), in which the judges held that Queen Elizabeth was without power to grant the penalty or benefit of a penal statute, or to transfer the power of dispensation to an officer of the crown. The Queen's act was held to be invalid, among other reasons, because "neither can any penal statute be prosecuted or executed in other manner or order of proceeding than by the act itself provided and prescribed." In the equally famous cases of *Millar* v. *Taylor* and *Donaldson* v. *Becket*, in the House of Lords, 4 Burrows 2305 *et seq.*, where it was held, nearly all the judges in England delivering opinions, that there was no common law property of copyright, the doctrine was frequently asserted. Willes, J., said "if the act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other modes and remedies are excluded" (p. 2323). Aston, J., remarked (p. 2351) that "the question (as to the common law remedy) wholly depends upon the point whether it be a right newly created or not. If it was, then it would receive its birth, duration and remedy from the statute and no other remedy could be pursued." Lord Mansfield concurred with these opin-

ions. In the House of Lords six of the judges expressed the opinion that by the Statute of 8th Anne, an author was precluded from every remedy except on the foundation of the statute, and on the terms and conditions prescribed thereby, and so the House found on the motion of Lord Camden, supported by the Lord Chancellor.

But the case most precisely in point, no doubt, is the New York case of *Dudley* v. *Mayhew*, 3 N. Y. 11, from which the foregoing interesting summary of the opinions in *Millar* v. *Taylor* is taken. Under the power conferred upon Congress by the Constitution (Art. 1, Sec. 8, Subdiv. 8), to secure to authors and inventors for a limited time, the exclusive right to their respective writings and discoveries, Congress by the Act of July 4, 1836, provided that all actions arising under any law of the United States confirming to inventors the exclusive right to their discoveries "shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the powers of a Circuit Court."

The decision of the Court of Appeals, that the state courts had no jurisdiction of patent litigation, was expressly predicated upon the principle of law above invoked (p. 15). Recognizing that the principle was inapplicable where a right was conferred and no remedy for its invasion was specified, the Court said: "It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms part of the remedy, and all others are excluded." It is difficult to perceive any substantial ground upon which this case can be distinguished in principle from the case at bar.

The foregoing doctrine has also been applied in principle in several cases in this court. In *Pollard* v. *Bailey*, 20 Wall. 520, 527, this court held that a statutory liability

of a stockholder to creditors could not be enforced in an action at law, but only by a bill in equity as seemed to be provided under the act creating the liability. After stating that the individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute; that at common law it did not exist; and that a statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement, this court said:

> "The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

In *Middletown Nat'l Bank* v. *R. R. Co.,* 197 U. S. 394, 405, this principle was directly applied to an action brought outside of the State of Ohio to recover on the stockholders' liability given by the statutes of that state, and it was held that the action could not be maintained; but that the statutory method providing for the enforcement of the right, to wit, "an action in any common pleas court" of the State of Ohio, must be followed. This court said:

> "The statute under such circumstances may be said to so far provide for the liability and to create the remedy as to make it necessary to follow its provisions and to conform to the procedure provided for therein."

See also:

> *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, 365.

It would therefore appear that Congress having created a new right in admiralty, and provided a remedy for its enforcement, viz., an action in the federal court of defendant's district, the remedy thus created is the only one that can be pursued; unless, indeed, the defendant by its consent, express or implied, consents to be sued in some other federal court having the substantive right to enforce the remedy.

There remains to be considered the argument in favor of the jurisdiction of the state courts, predicated upon the theory of a wholesale adoption by the Jones Act of "all statutes of the United States conferring or regulating the right of action in the case of railway employees," including as a part of such adoption the provision of the Employer's Liability Act specifically conferring upon the state courts jurisdiction of actions brought to enforce the liability defined by that statute, and prohibiting the removal of such actions to the federal courts. If the first clause of the Jones Act, viz., that in an action at law by an injured seaman "all statutes of the United States, modifying or extending the common law right or remedy in cases of personal injury to railroad employees shall apply," be read in connection with the concluding clause, it will be seen, however, that what is intended by the cross reference to such statutes is the adoption of the *substantive modifications* of the common law relating to cases of injuries or death. Indeed, this court has said so much. In *Matter of East River Towing Co., ubi supra,* this court said:

> "The short point is that the later Act (Jones Act) determines the extent of the seaman's substantive rights and the measure of damages."

And again:

> "The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of

> principles, not as a basis for a meticulous discovery of conflict with an established system in matter of detail."

It is evident that Congress in the Jones Act could not have intended to go further than this.

Many statutes of the United States relating to railway employees would have no possible application to employees on vessels navigating the high seas; as, for example, the provisions of the Safety Appliance Act (27 Stats. 531); the provisions of the Boiler Inspection Act (36 Stats. 913); the Hours of Service Act (34 Stats. 1415); the provisions in the Employer's Liability Act inhibiting the defense of assumption of risk where the provisions of any statute enacted for the safety of employees had not been complied with (35 Stats. 66). But nowhere is the conflict between the Employer's Liability Act and the Jones Act more apparent than at the precise point under consideration. In the Employer's Liability Act it is provided that an action under the Act "*may* be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business, at the time of commencing such action." And it is further definitely provided that the jurisdiction of the courts of the United States under the Act shall be *concurrent* with that of the courts of the several states, and that no action commenced in any state court shall be removed to any court of the United States. Under the Jones Act "jurisdiction in such actions *shall* be under the court of the district in which the defendant employer resides or in which his principal office is located"; no other district is considered; and there is no provision for concurrent state court jurisdictions. The provisions of the Jones Act are thus absolutely in contradiction with those of the Employer's Liability Act; and to hold that the provisions of the Jones Act, that in actions for injuries all statutes

of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees, and that in actions for death all statutes of the United States conferring or regulating the right of action for death, in effect took over intact the jurisdictional provisions of the Employer's Liability Act, is to hold that the express provision of the later specific act was overruled by the general reference to earlier legislation. This is contrary to all canons of statutory interpretation. If there be a specific provision, as there is, in the later act, it must, of course, control. The principle of adoption, thus extended so widely beyond its obvious purpose, would simply obliterate the concluding clause of the Jones Act altogether. If, to illustrate, an action should be brought by a seaman in a district "where the cause of action arose," even if other than that of defendant's residence, it would, under this theory, be properly brought, although the Jones Act specifies distinctly as the only proper district, or at least as the district as to which the defendant is originally vested with certain jurisdictional rights, the district wherein the defendant resides. No matter how diligent the defendant might be in asserting his rights, he could not enforce them; because the principle of construction applied leads inevitably to the conclusion that the specific jurisdictional right granted the defendant under the Jones Act was overruled by the contrary provisions of the preceding Employer's Liability Statute. The utter destruction of the defendant's rights under the concluding clause of the Jones Act becomes even more apparent, when the concurrent jurisdictional provisions of the earlier statute be considered. If that statute is to prevail over the definite provisions of the Jones Act, then an action must be permissible in the state courts according to their own rules of practice, and in New York, under the civil code, it

could be brought in the district of *either* the plaintiff's or the defendant's residence (Civil Practice Act, Sec. 182). Therefore, when, as here, an action is brought in the state district of the plaintiff's residence, the defendant could not by any proceeding whatsoever obtain the benefit of the specific jurisdictional rights conferred upon him by the federal law. What the reference to statutes of the United States in the Jones Act in a death action was intended to bring into that act was exactly what the act itself states, viz., the statutes of the United States "conferring" or regulating the right of action for death. In other words, it was evidently intended, without too much prolixity, to create by reference a right to an action for death in admiralty where none had theretofore existed. To extend the meaning of the act beyond this evident purpose, leads to manifest absurdities, none of which could be more palpable than the repeal, or, nullification, of the express provisions of the later and specific act by pointing to the conflicting provisions of a previous act referred to in only the most general terms.

CONCLUSION.

The case should be dismissed for lack of jurisdiction in the state court.

Respectfully submitted,

RICHARD REID ROGERS,
Solicitor for Petitioner.

No. 8[redacted]260

Office Supreme Court
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WM. R. STANS[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM—[redacted]1925

PANAMA RAILROAD COMPANY,

Petitioner,

—against—

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels and Credits which were of Maximiliano Sanchez, deceased,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM—1924.

PANAMA RAILROAD COMPANY,

Petitioner,

—against—

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels and Credits which were of Maximiliano Sanchez, deceased,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

1. The question which the Petitioner seeks to have reviewed in this case is whether *Section 20 of the Act of March 4, 1915, C. 153, 38 Stat. 1185, as amended by Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 1007, commonly known as the Jones Act,* which made certain substantive changes in the general maritime law with respect to actions for death and injury by seamen, is applicable to an action brought by the representatives of a deceased seaman in the New York State courts.

Respondent believes that this question has already been decided adversely to the Petitioner by this Court in *Panama Railroad Company* v. *Johnson,* 264 U. S. 375,

and *In Re East River Towing Co., Inc.*, decided by this Court December 8, 1924, not yet reported.

2. The present action was brought under the provisions of Section 33 of the Jones Act in the New York Supreme Court, Kings County, by the representatives of a deceased seaman, to recover damages for his death by the wrongful act of his employer.

The complaint alleges that Sanchez, the plaintiff's intestate, while in the employ of the defendant as a seaman, was killed on August 26, 1921, on board the defendant's steamer "General W. C. Gorgas," then in the waters of the State of New York, by coming in contact with a wire heavily charged with electricity.

Paragraph sixth of the complaint alleged that the injuries which caused the death of Sanchez were due to the dangerous, defective and unseaworthy condition of an electric wire and its appurtenances, which were part of the equipment and appliances furnished by the defendant as owner of the steamship "General W. C. Gorgas."

By paragraph eighth of the complaint, the plaintiff elected to have the action proceed under the Jones Act.

The defendant's answer constituted, in substance, a general denial of the allegations of negligence.

The case duly came on for trial in the New York Supreme Court and resulted in a verdict in favor of the plaintiff for $9,900, which was subsequently reduced by the Court to $7,000 and judgment entered for that amount.

The Petitioner thereupon filed an appeal to the Appellate Division of the Supreme Court for the Second Judicial Department, where the judgment was affirmed, with a slight modification not material here.

Thereafter the Petitioner took an appeal to the Court of Appeals for the State of New York, which affirmed the judgment below without opinion.

3. The Petitioner's contention that the Act applies only to actions brought in the Federal Court is based on the last sentence of Section 33 of the Jones Act, which reads as follows:

> "Jurisdiction in such actions shall be under the Court of the District in which the defendant employer resides or in which his principal office is located."

A similar contention was made by this Petitioner in *Panama Railroad Company* v. *Johnson,* 264 U. S. 375. In that case it was urged that Section 33 of the Jones Act was unconstitutional because of a supposed interference with the uniformity of the general maritime law by providing different rights in actions brought on the common law side of the Federal Court and in admiralty proceedings.

This Court pointed out that this position was untenable and held that the substantive provisions of Section 33 of the Jones Act are applicable whether the proceeding is in admiralty or on the common law side of the Federal Court.

It seems to us quite clear from the decision in *Panama Railroad Co.* v. *Johnson, supra,* that the substantive provisions of Section 33 of the Jones Act, are equally applicable whether an action is brought by a seaman in admiralty, in a State court or on the common law side of the Federal Court.

As this Court pointed out in *Panama Railroad Co.* v. *Johnson,* the provision contained in the last sentence of Section 33 only prescribes the *Venue* for actions brought under the section.

In this connection, Mr. Justice Vandevanter, writing for the Court, said:

> "A reading of the provision now before us with those sections (Sections 24, 51 of the Judicial Code) and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to effect the general jurisdiction of the District Courts, as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested nor do we perceive any. Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance. The words 'shall be' are stressed by the defendant, but as they are found also in the earlier provisions, which uniformly have been held to relate to venue only, they afford no ground for a distinction."

Of course, if the provision referred to related to "jurisdiction" and not merely to "venue" then, the District Court in which the defendant resided or in which its principal office was located, would be the only Court in the world which could apply the Jones Act.

However, the Federal Employers Liability Act expressly provides that the state courts shall have jurisdiction of actions brought thereunder and, as the Jones Act makes the Federal Employers Liability Act applicable to seamen in its entirety, it must be conceded that state courts will have jurisdiction of actions under the Jones Act unless there is something in the Jones Act itself depriving the state courts of jurisdiction. As pointed out by this Court in *Panama Railroad Company* v. *Johnson,* there is not a single word in the Jones Act which deprives the state courts of jurisdiction, the clause under discussion merely designates the federal district in which such actions shall be brought when a federal court is used as a vehicle, and the word "jurisdiction" as employed in the statute was used inaptly and does not refer to *"jurisdiction"* but is synonymous with "venue."

As already said, the statute is merely regulatory of *"venue"* when suit is brought in a federal court and does not attempt to regulate venue where action is brought in the state court. However, it is submitted that even if such were the case, a general appearance in the state court would constitute a waiver of the right to object to venue. It is not disputed that the defendant entered a general appearance in the case at bar.

Furthermore, as this Court pointed out in *Panama Railroad Co.* v. *Johnson,* Congress has pursued the policy of investing the federal courts with general jurisdiction, expressed in terms applicable alike to all of them, and of regulating the venue by separate provisions designating the particular district in which the defendant shall be sued, the purpose of the venue being to prevent defendants from being compelled to answer and defend in remote districts against their will.

In granting the federal courts general jurisdiction, Congress specifically saved to suitors "the right of a common law remedy." Judicial Code, Section 256. This, of course, means an action in the state court.

Chelentis v. *Luckenbach,* 247 U. S. 372.

Furthermore, to hold that a state court did not have jurisdiction to administer the Jones Act, would mean an unconstitutional encroachment on the maritime jurisdiction by interfering with its uniformity.

Southern Pacific Co. v. *Jensen,* 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 149;
Washington v. *Dawson & Co.,* 264 U. S. 219.

This Court, in *Panama Railroad Co.* v. *Johnson,* has

held that the Jones Act is merely an amendment to the maritime law.

The maritime law must be uniform in operation in *all* courts. *Ex parte State of New York*, 256 U. S. 490. In that case the Court said at page 502 (italics ours):

> "The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, *and binding upon other courts as well.*"

In *In Re East River Towing Co., Inc.*, decided by this Court, December 8, 1924, not yet reported, the steamtug "Edward," owned by the East River Towing Corporation, sank in New York Harbor because of an explosion of her boiler. This caused the death of her Captain, Thos. McCaffrey, and his administratrix brought suit against the company in the Supreme Court of New York. Thereupon the company filed a petition for limitation of liability in the District Court of the United States. The District Court made an order under Rule 51 restraining further prosecution of the suit, and, on motion, vacated the stay on the ground that the statutes limiting liability were repealed so far as they applied to the case by Section 33 of the Jones Act.

The Circuit Court of Appeals for the Second Circuit, certified two questions to this Court, the first of which was:

1. If an action at law be brought such as is described in the Merchant Marine Act of 1920, Section 33, can prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

This Court answered that question in the affirmative.

Mr. Justice Holmes, writing the opinion, said:

> "We answer these questions as they are asked and assume that the State Court had jurisdiction to try the case under the concluding words of the section: 'Jurisdiction in such actions shall be under the Court of the District in which the defendant employer resides, or in which his principal office is located."

It is submitted, however, that the statement that this Court assumed that the State Court had jurisdiction was more than a mere assumption. If the State Court under the facts in the *East River Towing Company* case had not had jurisdiction, there would be nothing to be restrained under Rule 51 because any action of the State Court would have been void.

The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 260.

PANAMA RAILROAD COMPANY,

Petitioner,

—against—

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels and Credits which were of Maximiliano Sanchez,

Respondent.

BRIEF FOR RESPONDENT.

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IN THE

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PANAMA RAILROAD COMPANY,

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—against—

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels and Credits which were of Maximiliano Sanchez,

Respondent.

RESPONDENT'S BRIEF.

A writ of certiorari has been granted to review judgment of the Court of Appeals of the State of New York which affirmed a judgment of the Appellate Division of the Second Department, which, in turn, affirmed a judgment of the Supreme Court in favor of this respondent against petitioner.

The action was by a seaman against his employer.

The sole question involved is whether, after the passage of the Jones Act, the courts of the several states have any jurisdiction to redress maritime tort on behalf of seamen against their employers.

Statement.

Maximiliano Sanchez, a seaman on the steamship "W. C. Gorgas", was killed on August 26, 1921, while

working on the vessel, which, at the time, was in floating drydock undergoing repairs. Sanchez was engaged in building a brick partition between two boilers. On account of the darkness he was provided with a portable electric light, having an ordinary unprotected bulb fastened to a socket at the end of a long black electric wire, stretched along the floor. The current for the light was conveyed to the vessel by direct connection from shore (Rec., pp. 11-15, 18, 19).

It was necessary in the progress of his work for Sanchez to move the light from one place to another, and while doing so a powerful voltage of electricity passed through his body and killed him instantly (Rec., p. 21).

The complaint alleged the employment of Sanchez by the defendant as a coal-passer aboard the vessel and the injury sustained by him while engaged in the employment aboard the vessel within the State of New York (Rec., p. 4). The complaint then alleges in paragraphs Sixth and Seventh in general terms, the violation of defendant's obligation and the negligent acts of the defendant which resulted in the injury complained of. In regard to the Jones Act, the complaint alleges in paragraph Eighth that thereby all statutes enacted in favor of railroad employees engaged in foreign or interstate commerce were made applicable to seamen employed upon the American vessels and that plaintiff, as the personal representative of the decedent, is entitled to recover damages for the negligence of the defendant (Rec., p. 5).

On the opening of the trial, the defendant moved to dismiss the complaint on the ground that the State courts had no jurisdiction. It was stated by the attorney for

the plaintiff that the suit was brought both under the Jones Act and the common law (Rec., p. 10).

It was shown that the decedent at the time of his death resided in Brooklyn, New York (Rec., p. 49).

At the end of the case the attorney for the defendant renewed his motion to dismiss (Rec., p. 108). The Court asked the attorney for the plaintiff whether he wanted the case submitted under the common law or the Jones Act. The attorney for the plaintiff contended that in the respects involved in this suit, the law was practically the same (Rec., p. 108).

The attorney for the defendant took no exception to any part of the charge of the Court on the subject of contributory negligence and made no request to charge based upon any possible distinction between the submission of the case under the common law or under the Jones Act (Rec., p. 116).

The record therefore presents in the broadest possible manner the question as to whether after the passage of the Jones Act, any power of enforcement survives in the State courts in seamen's cases of maritime tort.

POINT I.

The State Court had jurisdiction over the suit. Jurisdiction in the courts of the United States and in the courts of the several states to enforce the Jones Act is concurrent.

(a) *Jurisdiction of state courts to enforce maritime law, long recognized.*

In *The Hamilton*, 207 U. S. 398, this Court, at 404, said:

> "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it', Rev. Stats. § 563, Cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the Legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts, tends to establish the legislative power of the State where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase*, 16 Wall. 522."

See also:

> *McDonald, as Adm.* v. *Mallory*, 77 N. Y. 546.

Cases holding that the general maritime law may not be radically changed by state statute are predicated on a jurisdiction in the state courts to enforce such law.

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, this Court held that the provision of Section 9, Judiciary Code, 1789, granting to United States District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * *, saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it" was a saving clause, and stated at page 159:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified *permitted continued enforcement by the state courts of rights and obligations founded on maritime law.*"

In *Ex Parte State of New York, No. 1*, 256 U. S. 490, this Court, at page 502, said:

> "The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well."

See also:

> *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, at 383;
> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

There should be no divesture or revocation, by implication or by anything other than express statute, of

this long recognized jurisdiction on the part of the courts of the several states. The Jones Act does not constitute a revocation, expressed or implied.

In *Patrone* v. *Howlett,* 237 N. Y. 394, the Court in this respect, at page 397, said:

> "The Jones Act gives a seaman an action at law in place of the common-law remedy reserved to him in addition to his action *in rem* in admiralty by the Judiciary Act of 1789. Prior to its passage he had the right to resort to the state courts whenever they were competent to give a remedy. It does not expressly or by necessary implication take away the right to resort to the state courts. It provides for the venue, when the action is brought in the United States court, and probably that is as far as it goes in defining jurisdiction."

In *Tammis* v. *Panama Railroad Co.,* 202 App. Div. 226, there is a careful and well-reasoned opinion of the Court to the same effect that there should be no revocation of authority by other than express terms of statute and that the Jones Act does not show any intention to divest state courts of previously exercised jurisdiction.

There is the strongest presumption against any such sweeping repeal or change where express words having such effect are not used in the statute.

> *Bookbinder* v. *United States,* 287 Fed. 790 (C. C. A. Third Cir.), at 792.

(b) *Concurrent enforcement fundamental and an essential feature of the Employers' Liability Act.*

The principle of concurrent enforcement is so fundamental that it may well be presumed in the absence of the clearly expressed statutory intent to the contrary.

In *Minnesota & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, this Court, at page 221, stated that it is an essential principle "upon which our dual constitutional system of government rests" that

> "lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts, by the authority, state or nation, creating them. This principle was made the basis of the first Federal Judiciary Act and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative enactment, state or national. In fact this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally

within the scope of the jurisdiction conferred by the government creating them."

In *Galveston H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481, this Court, at 490, said:

> "And, considering the relation between the Federal and the State Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 624, 637."

Where the subject matter of the legislation is the relationship between employer and employee, which may be expected to involve a large amount of litigation throughout the United States, the principle of concurrent enforcement is essential. In the Federal Employers' Liability Act, therefore, this principle is not left to implication but is set forth in specific terms. It is significant, moreover, that this Court has pointed out that concurrent enforcement thereof existed independent of its expression in the statute. In *Second Employers' Liability Cases*, 223 U. S. 1, at 56, this Court said:

> "This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that 'The jurisdiction of the courts of the United States under this act shall be *concurrent with that of the courts of the several states*, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States'. The amendment, as appears by its language, instead of

granting jurisdiction to the state courts, *presupposes that they already possessed it.*"

(c) *Congressional intent that enforcement of Jones Act be concurrent, manifest from the terms of the Act itself.*

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, at 213, this Court in the year 1917 held that the Federal Employers' Liability Act applied only where the injuries occurred in railroad operations and could not be extended to maritime transportation.

The problem before Congress was therefore either to create a new body of law having application to the relations between employer and employee aboard vessels or to extend an existing body of law to such closely analogous circumstances. The old body of law involved a relationship of master and servant in a particular class of carrier. The new body of law was to involve the same relationship in regard to another class of carrier. The old body of law had been found adequate and, in a multitude of decisions in the federal and in the state courts, had been applied in its various aspects. It was therefore natural that Congress should conclude to extend the old body of law to the new situation.

It will be borne in mind that at the time Congress determined to extend the provisions of the Federal Employers' Liability Act to seamen's cases, not only had the concurrency enforcement feature been recognized as fundamental and general, but it had been incorporated as an essential express provision in the Employers' Liability Act and had been given prominence by the decision of this Court.

The Jones Act thus provided (Act of March 4, 1915, Chap. 153, Sec. 20, as amended Act June 5, 1920, Chap. 250, Sec. 33) (Compiled Statutes, Sec. 8337a):

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;* and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action *all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Jones Act thus, by reference, makes a part thereof *all* statutes of the United States modifying or extending the common-law *right* or *remedy* in cases of personal injuries to railway employees and, in death cases, repeats the incorporating reference: *"all* statutes of the United States *conferring* or *regulating* the right of action for death in the case of railway employees shall be applicable."

In each case the reference is all-inclusive. In the first case, the reference further identifies such statutes as involving both right and remedy. In the second in-

stance, the reference further identifies such statutes both as to rights conferred and rights regulated.

The main statute on the books upon this particular subject which Congress necessarily intended to incorporate was the Employers' Liability Act (Act, April 22, 1908, Chap. 149, Sections 1 to 9) (Compiled Statutes, Sections 8657-8665). Section 1 of this Employers' Liability Act relates to a general liability on the part of common carriers by railroad to employees for negligence. Section 2 is on the same subject. Section 3 deals with the subject of contributory negligence. Section 4 with the subject of assumption of risk. Section 5 declares void contracts exempting the carrier from liability under the Act. No one would have any justification for contending that these first five sections have not been made applicable, under the Jones Act, to actions by seamen.

Section 6 of the Employers' Liability Act provides as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.
>
> Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. *The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States,* and no case arising under this Act and brought in any state court of competent

> jurisdiction shall be removed to any court of the United States."

The argument of petitioner must necessarily be that, although the first five sections of the Employers' Liability Act have under the terms of the Jones Act been made applicable to actions by seamen, nevertheless, the immediately following section, namely, Section 6 in the same statute, dealing with the same subject matter, has not been made applicable and that when Congress under the terms of the Jones Act made *all statutes* of this class applicable, for some reason this particular section was lifted out of these all-inclusive provisions.

Nothing in the terms of either Act justifies this deletion.

Furthermore, it will be noticed that Section 6 of the Employers' Liability Act is in two paragraphs. The first paragraph constitutes the statute of limitations. Certainly, petitioner cannot contend that this provision must not by reference be carried over and made applicable to actions by seamen. The argument of petitioner must therefore be narrowed to the contention that for some reason Section 6 was intended by Congress to be split in two and one-half of it drawn over by reference to actions by seamen, but that the second half of it, for some unexplained reason, must be cast out from the all-inclusive incorporating provisions.

The internal evidence not only furnishes no justification for such a contention but on the contrary establishes that Congress had in mind the incorporation of this particular Section 6 when, by the terms of the Jones Act, it made all statutes of the United States in the case of the railroad employees applicable. For Section

6 of the Employers' Liability Act contains among its various provisions certain features of venue appropriate to actions by railroad employees, but hardly fitting to suits brought by sailors. It provides that suit by the railroad employee may be brought in a (circuit court) of the United States (1) in the district of the residence of the defendant, or (2) in which the cause of action arose, or (3) in which the defendant shall be doing business at the time of commencing such action. In the case, however, of suits by seamen, where the cause of action in many cases might arise at sea, these venue provisions were obviously not entirely applicable. The Jones Act therefore sets forth venue provisions modifying in this sole respect the Employers' Liability Act and providing that actions be brought in the district (1) in which the defendant employer resides, or (2) in which his principal office is located.

There is no other modification of the Employers' Liability Act and more specifically there is no other modification of Section 6 of the Employers' Liability Act. No other modification was necessary. The provisions in regard to concurrency of enforcement expressly set forth in the Employers' Liability Act were not modified, but along with the statute of limitations set forth in the same section, were obviously included within the provisions made applicable by the all-inclusive reference. The defendant employer cannot pick and choose what provisions should be applicable when Congress has definitely stated they all should be applicable.

Where the concurrent enforcement features of the Employers' Liability Act are not in any way inconsistent with the provisions of the Jones Act incorporating them,

the Court is obligated to hold that they constitute a part of the Jones Act.

> *Daviess, et al.* v. *Fairbairn*, 3 How. 636, at 644.

Where this Court has held that the express concurrent enforcement features of the Employers' Liability Act constitute in effect a recognition of that which exists without them, and Congress thereafter incorporates all of such provisions in a later statute, there is no justification for this Court in then refusing to recognize what it has before recognized. Its decision in regard to the Employers' Liability Act on the contrary has in reality become a part of the re-enactment of the Employers' Liability Act into the Jones Act.

> *United States* v. *Hermanos y Compania*, 209 U. S. 337, at 339;
> *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, at 479;
> *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, at 401, 402.

When the Employers' Liability Act had been for years enforced in the state courts and when Congress was extending it to seamen, it would have been peculiarly inapt not to have extended the feature of concurrent enforcement. There could be no adequate extension which omitted it.

(d) *The essential elements of concurrency of jurisdiction have been determined by this Court.*

The particular language of the Jones Act, which petitioner herein contends constitutes a grant of exclusive jurisdiction to the Federal Court and an elimination of jurisdiction in the state courts is as follows:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This Court, however, has construed and has determined the meaning of this clause.

In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, this Court, at page 384, held that this provision was "not happily worded" and determined that it affected venue rather than jurisdiction, saying:

> "A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not entitled to affect the general jurisdiction of the district courts as defined in Section 24 (Judicial Code) but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance. * * *
>
> By a long line of decisions, recently re-affirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert or may waive, at his election, and does waive if, when sued in another district, he enters a general appearance before or without claiming his privilege."

In *re East River Co.*, 266 U. S. 355, the Jones Act was again before this Court. Suit had been brought thereunder in the state court. An injunction had been brought to stay the action for matters not involving jurisdiction. This Court assumed that the state court had jurisdiction, at page 368, saying:

> "We answer these questions as they are asked and assume that the State Court had jurisdiction to try the case under the concluding words of the section: 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' For assuming that it had jurisdiction we have no doubt that the injunction may issue and that the statute regarding limitation of liability of ship owners has not been repealed so far as claims like the present are concerned."

The Federal courts after a preliminary period of uncertainty have now recognized the concurrent jurisdiction of the state courts under the Jones Act and have furthermore recognized that under the provisions of the Employers' Liability Act, by terms made applicable, suits in the state courts should not be removed to the Federal court.

Atianza v. *United States Shipping Board*, 3 F. (2d) 845;
Beer v. *Clyde S. S. Co.*, 300 Fed. 561;
Herrera v. *Pan-American*, 300 Fed. 563;
Reyes v. *United States Shipping Board*, 299 Fed. 957;
Martin v. *United States Shipping Board*, 1 F. (2d) 603.

Some Federal decisions, although they have held that suits in the state courts are removable, nevertheless, have held that jurisdiction is also in the state court.

> *Petterson* v. *Hobbs, Wall & Co.,* 300 Fed. 811, at 812.

We cannot agree with petitioner in its statement at page 5 of its brief that *Wenzler* v. *Robin S. S. Co.,* 277 Fed. 812, at 817, holds that jurisdiction in the Federal courts is exclusive. On the contrary, the Court, at 817 and 818, said:

> "The extent to which it (Congress) may or may not confer jurisdiction over Federal questions upon the state court it is not necessary to consider. The jurisdiction of the state courts being general in its nature, that general jurisdiction may be so far recognized by Congress by legislation concerning the enforcement of rights arising out of Federal law as to leave the door of the state court open to the litigant. * * * Congress did not seek to confer a power, but rather to leave undisturbed any rights to sue at common law, including the right to sue in a state tribunal."

Nor can we agree with the petitioner in its statement at page 5 of its brief that the case of *Barrington* v. *Pacific S. S. Co.,* 282 Fed. 900, held that jurisdiction was exclusive in the Federal courts, for it would appear that the decision in that case was merely that one district of the Federal court (as distinguished from another district of the Federal court) did not have jurisdiction.

The third case cited by petitioner at page 5 of its brief as holding that jurisdiction in the Federal court is exclusive, namely, the case of *Lorang* v. *Alaska S. S. Co.*, 298 Fed. 547, did hold that jurisdiction in the Federal court was exclusive, but Judge Neterer, who wrote the opinion therein, later changed his view and, in the case of *Cook* v. *Alaska S. S. Co.*, 8 F. (2d) 207, remanded the case brought under the Jones Act to the state court, as stated at page 6 of petitioner's brief.

State courts have exercised jurisdiction to enforce the Jones Act.

Tammis v. *Panama Rd.*, 202 App. Div. 226;
Lynott as adm. v. *Great Lake Transit*, 202 App. Div. 613 (Aff. 234 N. Y. 626);
Bennett as adm. v. *Connelly*, 122 Misc. 149 (Aff. 208 App. Div. 852);
Engel v. *Davenport*, 67 Cal. Dec. 325, on rehearing (now before this Court on certioriari). 194 Cal - 344

POINT II.

Judgment should be affirmed, with costs.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 260.—October Term, 1925.

Panama Railroad Company, Petitioner, *vs.* Agapito Vasquez, Administrator etc.	Writ of Certiorari to the Supreme Court of the State of New York.

[June 7, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action by the personal representative of a deceased seaman against the owner of the ship whereon he was serving at the time of his death to recover damages for the death on the ground that it was caused by the owner's negligence in providing an unfit lighting appliance to be used by him in his work. The right of action was based on section 20 of the Seamen's Act of 1915, c. 153, 38 Stat. 1164, as amended by section 33 of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988. A judgment for the plaintiff was affirmed by the highest court of the State; and the defendant brings the case here.

The sole question presented is whether state courts may entertain such actions, the defendant's contention being that they are cognizable only in the federal district courts.

Amended section 20,* as heretofore construed, changes the prior maritime law of the United States by giving to seamen injured

*"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

through the negligence of their employers, and to their personal representatives where the injuries result in death, the rights given to railway employees and their personal representatives by the Employers' Liability Act of 1908 and its amendments, *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375. And the procedural provisions therein have been construed—when read in connection with sections 24 (third) and 256 (third) of the Judicial Code, and in the light of constitutional rules respecting admiralty and maritime jurisdiction—to mean that the new substantive rights may be asserted and enforced either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury; but always taking the changed maritime law as the basis and measure of the rights asserted. *Panama R. R. Co.* v. *Johnson, supra.*

The sections of the Judicial Code just cited, while investing the federal district courts with jurisdiction "exclusive of the courts of the several States" of all "civil causes of admiralty and maritime jurisdiction," contain an excepting clause expressly "saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it." This clause is a continuation of a like clause in the Judiciary Act of 1789 and always has been construed as permitting substantive rights under the maritime law to recover money for service rendered, or as damages for tortious injuries, to be asserted and enforced in actions *in personam* according to the course of the common law. *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, 384; *Panama R. R. Co.* v. *Johnson, supra,* pp. 388, 390. And it uniformly has been regarded as permitting such actions to be brought in either the federal courts or the state courts, as the possessor of the right may elect. *Leon* v. *Galceran*, 11 Wall. 185, 188; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Chappell* v. *Bradshaw*, 128 U. S. 132, 134; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123.

In so saying, we must be understood as fully recognizing what often has been held in other cases—that the saving clause does not include suits *in rem* or other forms of proceeding unknown to the common law. *The Moses Taylor*, 4 Wall. 411, 431; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Southern Pacific Co.* v. *Jensen*, 244

U. S. 205, 218. But an action *in personam* to recover damages for tort is one of the most familiar of the common-law remedies; and it is such a remedy at law that is contemplated by amended section 20 of the Seamen's Act and invoked in this case.

The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions *in personam* according to the course of the common law. This is the view that was taken in *Steamboat Company* v. *Chase,* 16 Wall. 522, 533.

The defendant also points to the provision in amended section 20 saying, "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located," and argues therefrom that Congress has manifested a purpose to restrict the enforcement of the newly given rights to the federal district courts. The provision is not aptly worded to express that purpose, and taken alone is confusing. We think it falls short of that certainty which naturally would be manifested in making an intended departure from the long-prevailing policy evidenced by the saving clause in the Judiciary Act of 1789 and in the two sections of the Judicial Code, and that the more reasonable view is that it is intended to regulate venue and not to deal with jurisdiction as between federal and state courts. *Panama R. R. Co.* v. *Johnson, supra,* pp. 384, 391; *Re East River Co.,* 266 U. S. 355, 368; *Engel* v. *Davenport,* (decided April 12, 1926).

We well might have rested our decision here on the conclusion reached in *Engel* v. *Davenport,* where we said, "It is clear that the state courts have jurisdiction, concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law." But out of deference to the elaborate presentation of the question in this case we have stated and dealt with the several points advanced as making for a different conclusion.

Judgment affirmed.